110-348

No. 893.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE SPRING VALLEY WATER WORKS,
Plaintiff in Error,

vs.

ANTONE SCHOTTLER, ET ALS.
Defendants in Error.

Brief for Plaintiff in Error.

CHAS. N. FOX,
Attorney for Plaintiff in Error.

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BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

Writ of Error to the Supreme Court of California, to review a judgment of that Court denying the application of the Plaintiff in Error for a writ of mandate against the Defendants in Error, the Board of Supervisors of the City and County of San Francisco, requiring them to fill a vacancy in the Board of Commissioners appointed to fix water rates in said city and county.

In 1858, the Legislature of California passed an Act of which the following is a copy:

"An Act for the Incorporation of Water Companies.

[Approved April 22d, 1858, 218.]

"SECTION 1. The provisions of an Act entitled an Act to provide for the formation of corporations for certain purposes, passed April fourteenth, one thousand eight hundred and fifty-three, and the provisions of an Act to amend an Act entitled an Act to provide for the formation of corporations for certain purposes, passed April fourteenth, one thousand eight hundred and fifty-three, and passed on the thirtieth (30th) day of April, one thousand eight hundred and fifty-five, shall extend to and apply to all corporations already formed, or hereafter to be formed, under said Acts, for the purpose of supplying any city and county, or any cities or towns in this State, or the inhabitants thereof, with pure, fresh water.

“Sec. 2. Any company incorporated for the purposes specified in the preceding section, shall have the right to purchase, or appropriate and take possession of, and use and hold all such lands and waters as may be required for the purposes of the company, upon making compensation therefor. The mode of proceeding to appropriate and take possession of such lands and waters, when the parties cannot agree upon a purchase thereof, shall be the same as prescribed in sections twenty-seven, twenty-eight, and twenty-nine, of an Act to provide for the incorporating of railroad companies, passed April twenty-second, eighteen hundred and fifty-three, except that such proceedings shall be had before the County Judge of the county in which such lands or waters, or both, may be situated. But when the County Judge shall be a party interested, then the same proceedings shall be had before the District Judge of the District where the lands, or waters, are situated; provided, that all canals, reservoirs, ditches, pipes, aqueducts, and all conduits, heretofore built, or that hereafter may be constructed, by any corporation, formed under this Act, or claiming the privileges, rights, or immunities, herein granted, or any of them, shall be used exclusively for the purpose of supplying any city, or county, or any cities, or towns, in this State, or the inhabitants thereof, with pure, fresh water.—*Am* 1861, p. 228.

“Sec. 3. All privileges, immunities, and franchises, that may hereafter be granted to any individual or individuals, or to any corporation or corporations, relating to the introduction of fresh water into the City and County of San Francisco, or into any city or town in this State, for the use of the inhabitants thereof, are hereby granted to all companies incorporated, or that may hereafter become incorporated, for the purposes aforesaid.

“Sec. 4. All corporations formed under the provisions of this Act, or claiming any of the privileges of the same, shall furnish pure, fresh water to the inhabitants of such city and county, or city or town, for family uses, so long as the supply permits, at reasonable rates and without distinction of persons, upon proper demand therefor, and shall furnish water to the extent of their means, to such city and county, or city or town, in case of fire or other great necessity, free of charge. And the rates to be charged for water shall be determined by a Board of Commissioners, to be selected as follows: Two by such city and county, or city or town, authorities, and two by the water company; and in case the four cannot agree to the valuation, then, in that case, the four shall choose a fifth person, and he shall become a member of said Board; if the four Commissioners cannot agree upon a fifth, then the Sheriff of the county shall appoint such fifth person. The decision of a majority of said Board shall determine the rates to be charged for water for one year, and until new rates shall be established. The Board of Supervisors, or the proper city or town authorities, may prescribe such other proper rules relating to the delivery of water, not inconsistent with this Act and the laws and Constitution of this State.

"SEC. 5. Any corporation created under the provisions of this Act, shall have the right, subject to the reasonable direction of the Board of Supervisors, or city or town authorities, as to the mode and manner of exercising such rights, to use so much of the streets, ways and alleys, in any town, city, or city and county, or any public road therein, as may be necessary for laying pipes for conducting water into any such town, city, or city and county, or through or into any part or parts thereof.

"SEC. 6. Any corporation heretofore formed for the purpose specified in this Act, shall have the right to reincorporate under the provisions of this Act, without losing, forfeiting, or diminishing any of the rights, privileges, franchises, or immunities which they have heretofore lawfully acquired."

At the same session, the Legislature passed another Act, approved on the 23d day of April, granting to George H. Ensign and his associates, the right to lay pipes in the streets of said city and county, requiring them to incorporate under the general laws, and attempting to give them specially certain rights and privileges, and impose upon them certain obligations, corresponding in the main with those prescribed in the Act above quoted, but further allusion to it is unnecessary here, as the Supreme Court of the State held in 1874, in the case of the *City and County of San Francisco vs. the Spring Valley Water Works* (48 Cal., 493), that the Ensign, or special Act was void, and that the rights of the parties are to be tested exclusively by the Act of April 22, above quoted.

On the 19th of June, 1858, the Plaintiff in Error was incorporated under the general laws of the State, including the Act above quoted, by the holders of the franchise attempted to be granted by the Ensign Act, but reciting in their articles of incorporation that they did so incorporate "under and in conformity with the requirements of an Act of the Legislature of the State of California, entitled 'An Act to authorize George H. Ensign and others, owners of the Spring Valley Water Works, to lay down water-pipes in the public streets of the City and County of San Francisco,' passed April 23, 1858, and by virtue of an act of the Legislature aforesaid, entitled 'An Act for the Incorporation of Water Companies,' passed April 22, 1858, and in conformity with such other laws, or parts of laws, relating to the formation of corporations, as are now in force in said State of California."

And also declaring that: "The object for which said Company is formed, is the introduction of pure, fresh water into the City and County of San Francisco, and into any part thereof, from any point or points, place or places, for the purpose of supplying the inhabitants of said city and county with the same, and to do and transact all such business relating thereto, as may be necessary and proper, not, however, to be inconsistent with the laws, and Constitution of the State of California."

These articles of incorporation have been passed upon, and held sufficient by the Supreme Court of the State in *Matter of S. V. W. W.*, 17 Cal., 132, and in *S. V. W. W. vs. San Francisco et als.*, 22 Cal., 434; and in the case in 48 Cal., above referred to, it was held that the Company thereby incorporated, became subject to, and was dependent for its rights and privileges, upon the Act of April 22, 1858, above quoted.

The Company immediately organized and commenced business, and since 1861, has been supplying the city and county, and the inhabitants thereof, with water from its works, and has never received any compensation for water supplied for municipal purposes.

The City and County of San Francisco is, and since 1856 has been, a municipal corporation, of which the Board of Supervisors is the legislative and governing body; and the defendants in error here are, and constitute the Board of Supervisors of said municipality.

In January, 1878, a Board of Commissioners was appointed in accordance with the provisions of section 4 of said Act of April 22, 1858, to fix water rates, of whom Isaac Friedlander was one appointed on behalf of the city by the Board of Supervisors. This Board fixed and determined upon a tariff of rates to be charged and collected by this plaintiff, for water supplied to the inhabitants of said city and county, to take effect on the first day of June, 1878, to remain in force for one year, and until new rates were established as provided in the Act.

In July, 1878, said Friedlander died, causing a vacancy in said Board, which vacancy was never afterwards filled.

Meantime, in 1879, the people adopted a new Constitution of the State, which went into effect January, 1880, and which contained among others, the following provision:

"ARTICLE XIV. Section 1. The use of all water now appropriated, or that may be hereafter appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law; *provided* that the rates or compensation to be collected by any person, company, or corporation in this State for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed annually, by the Board of Supervisors, or city and county, or city, or town council, or other governing body of such city and county, or city, or town, by ordinance or otherwise, in the manner that other ordinances, or legislative acts, or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any Board or body failing to pass the necessary ordinances or resolutions fixing water rates where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the Legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city, or town in this State, otherwise than as so established, shall forfeit the franchises and water works of such person, company, or corporation to the city and county, or city or town, where the same are collected, for the public use.

"SEC. 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

Upon the adoption of this Constitution, the Board of Supervisors, defendants herein, claimed and undertook to exercise the right by ordinance to fix and prescribe the rates that should be collected by this plaintiff for water supplyed by it to the city and county and the inhabitants thereof, for all purposes except those for which it had been held that the municipality was entitled to free water under the Act of 1858; and denied and ignored the right of the plaintiff to have any voice in the fixing of such rates, or to have them fixed by a Commission as prescribed in said Act of 1858; and refused to appoint a Commissioner to fill the vacancy in said Board of Commissioners.

Thereupon this proceeding was commenced for a writ of mandate to compel the defendants to appoint a Commissioner to fill such vacancy. An alternative writ was issued, and the matter was heard upon demurrer thereto. The Court held that the Constitution had repealed and "struck null" that part of section 4 of the Act of 1858, which provided for the appointment of Commissioners to fix the water rates, and denied the peremptory writ, when plaintiff brought the case to this Court by Writ of Error.

ASSIGNMENTS OF ERROR.

I. The Supreme Court of California erred in holding that Section 1 of Art. XIV of the Constitution of 1879 repealed or annulled that part of Section 4 of the Act of 1858, which provides for the appointment of a commission to fix water rates, and gave to the Company the right to select two of the commissioners; because the provision of the Constitution, thus construed, is in conflict with the provision found in Art. I, Sec. 10, of the Constitution of the United States, that "No State * * * shall pass any * * * law impairing the obligation of contracts."

II. The Court erred in holding that either under the Constitution of 1879, or the Act of 1881 (referred to by the Court,) the Board of Supervisors are authorized to fix the rates to be collected by plaintiff for water supplied to the city and county, or to the inhabitants thereof:

First.—For the reason before assigned.

Second.—Because such a law would authorize the Board of Supervisors to deprive the plaintiff of its property without due process of law, contrary to the provisions of the *fifth* and of the *fourteenth* amendments to the Constitution of the United States.

Third.—Because such a law would authorize the Board of Supervisors to take private property for public use, without just compensation, contrary to the provisions of the *fifth* amendment to the Constitution of the United States.

ARGUMENT.

I.

The State has no right, by virtue of its govermental powers alone, to interfere in any manner with the regulation of the rates to be collected by the plaintiff.

Before entering upon the more direct discussion of the errors assigned, it is well to determine by what right, if any, the State can in any manner interfere with the fixing of water rates, and in presenting this question, we feel that we are treading upon new ground, and asking the Court to pass upon a question which, so far as we have discovered, has never been passed upon by the Court. At the same time, this Court has rendered some decisions which have been construed (erroneously as we think) to cover the point here involved, and for this reason we beg the indulgence of the Court if we present the case more at length than would otherwise be justified in a printed brief.

The term used—" water rates "—if not carefully considered, is likely to mislead. In form it is not unlike that used in reference to other classes of business, where this Court has held that the State has, by virtue of its governmental powers, the right to regulate the " rates " to be charged; and for this reason the Supreme Court of California, in common with many of the people, have fallen into the error of supposing that the same principle applied to the business of this plaintiff as to that of transportation companies, toll roads, wharves, warehouses, and the like. The error is, perhaps, not an unnatural one, but it is none the less an error. In the entire class of cases referred to, and upon which the Court has passed, the subject of State regulation was the price to be charged for *the use* of property, the title to and possession of which still remained in the original holder; while here, the subject which the State claims the right to regulate is the price of the property itself, when both title and possession passes for the price—when taken not for temporary use and return, but for perpetual retention and absolute consumption.

The case of *Munn* v. *Illinois* (94 U. S. 118,) which perhaps was as carefully considered as any other, and where the Court has gone as far, in sustaining the right of the State in this regard, seems to have proceeded entirely upon the theory that the owner of property had engaged in such a business that he had in effect granted to the public *an interest in its use*, and for that reason must, *to the extent of that interest*, submit to be controlled by the public as *long as he maintained the use*, but that the grant could be withdrawn at any time (and the public control would thereby cease), by discontinuing such use. But there is nothing in it to indicate that the property itself could be taken without due process of law. The entire opinion of His Honor the Chief Justice, and the elaborate quotations from eminent English jurists and commentators, all show that the subject of discussion and determination was the right of the State to regulate the price which should be paid for the *temporury use, only*, of property, the title and possession whereof still remained in the owner.

So, also, in the railway cases which immediately follow in the same volume, and commonly known as the "Granger Cases," all relate to the price to be charged for the *use* of the property, and not for the property itself—the tolls, or fares and freights to be paid for transportation in a train—not the *price* to be paid for title to and possession of the train itself.

But here the case is altogether different. This plaintiff is not engaged in the business of either housing, storing or transporting the persons or property of others. It is neither a common carrier, a warehouseman, or a wharfinger. Nor is it rendering service as a public servant, or engaged in any business where either individuals or the Government are required, from necessity or otherwise, to patronize it.

But the business of this plaintiff is simply that of acquiring, storing, transporting and selling personal property of its own, and the question to be considered is, the right of the State to fix the price at which its private personal property—its goods, wares and merchandise—shall be sold, title and possession irrevocably passing at the time of sale.

As will be seen by reference to the Act of 1858, hereinbefore quoted at length, that Act, although entitled "An Act for the incorporation of water companies," made no provision whatever for the formation of corporations of any kind or character. It simply provided that corporations which have formed or will form under another law relating to the formation of corporations for trade, business and commerce, to engage in the particular trade, business or commerce of supplying water to the inhabitants of cities or towns, shall have, in addition to the rights acquired under the law of their incorporation, these special privileges and rights which are offered as an inducement to put private capital into a business of an experimental character, or extraordinary hazard, and so far of a public nature as that it will supply a great public want.

The Act referred to, and under which this plaintiff really derives its corporate existence, and all its general powers, is entitled "An Act to provide for the formation of corporations for certain purposes, approved April 14, 1853, and the Acts amendatory thereof. Its first section reads as follows:

> "Corporations for manufacturing, mining, mechanical, mercantile, wharfing and docking, or chemical purposes, or for the purpose of engaging in any other species of trade, business, or commerce, foreign or domestic, may be formed according to the provisions of this Act; such corporations and the members thereof being subject to all the conditions and liabilities herein imposed, and none others."

The remaining sections provide the mode of incorporation and prescribe the general powers, and the manner of carrying on corporate business. There was, in 1858, no necessity for the passage of a law to enable people to incorporate for the purpose of engaging in any class or species of business, trade, or commerce; for there was already upon the statute books this law for that purpose, so well framed and so carefully considered, that it has stood the test of nearly thirty years without any material alteration, and under it capital to an enormous amount has been invested; and by reason thereof the State has prospered beyond precedent, and almost beyond calculation. But there was a great, an overwhelming necessity for offering inducement to capital to organize under the law for the purpose of engaging in the particular "trade, business, or commerce," of introducing fresh water into the cities and towns of the State. The business itself was precarious and uncertain. Populous towns were springing up, as if by magic, in every part of the State, where the greatest and most expensive necessity was that of water, and yet men dare not invest capital in providing for that necessity, lest to-morrow the town should fall into decay, and in a year its streets become deserted. Provision for this necessity was expensive and uncertain, because of the arid climate, the long seasons of drouth, and the scarcity of living streams or accessible lakes. Even that city which was not only the metropolis of the State, but of the whole coast, though a goodly city in point of numbers of its population, was a beggarly one in the character of its structures, and a terribly expensive one in which to live or do business, for want of this necessary element to man's existence. Builded upon a barren sand where it was supposed little or no water could be found, and where no rain fell for eight months in the year, water for domestic uses of its inhabitants was brought by boat across a rough channel from a distant shore, and peddled from house to house by the single gallon, to meet the absolute demands of nature, and at a cost which enforced the most parsimonious use. All the water it was possible to get for the extinguishment of fires or the sprinkling of streets must be drawn from the bay, and the irrigation of parks or cultivation of public or private grounds was an impossiblity. The result was that improvements of any value would not spread beyond the reach of the water line; everywhere rates of insurance were almost equal to confiscation; garbage accumulated until pestilence threatened; all for the want of that element necessary alike to the existence of towns and of people. There was neither lake nor river accessible for its supply. To supply it in such quantity as necessity demanded, the water must be gathered from the clouds and stored in lakes of artificial construction. The attempt to do this, and thereby to furnish pure and wholesome water during the long dry seasons, was purely experimental. The history of the world furnished no precedent which gave guarantee of success. The government shrank from the task of undertaking to supply this great necessity; it was too great an undertaking for individual effort, and private capital was unwilling to assume all the risk even in corporate form, under laws which placed it at the mercy of such individuals as might be in the pathway of the works, gave the local authorities the right to demand whatever they pleased for the privilege of entering the municipality with the works. For such was the law when this Act of 1858 was introduced, and when the Legislature, through the Act, appealed to capitalists to supply this necessity, and do what neither the State nor the city was willing to undertake.

Looking then to the Act of 1853 for its existence, and to the guarantees of the Act of 1858 for the protection of its capital, this corporation has contributed to the meeting of this great necessity by the expenditure of nearly twenty millions of dollars for the purchase of lands and the creation thereon of immense artificial lakes in which to gather and store the waters that fall in winter upon its own soil; in the construction of some fifty miles of aqueduct for the transportation of its property thus acquired and held, to the market at which it proposed in its articles of incorporation to sell the same; to the purchase of lands and erection thereon of distributing reservoirs in the city of San Francisco, the laying down of two hundred miles of iron mains in the streets of that city, and in the erection of other works necessary to the transaction of its business.

As long ago as 1862, the Supreme Court of the State passed upon the character of a corporation formed under this law, and of its rights of property in the water thus acquired and held, in the following language:

"The first section of the Act of April 14th, 1853, as amended by the Act of April 30, 1855, provides for the formation of 'corporations for manufacturing, mining, mechanical, wharfing and dockage, or chemical purposes, or for the purpose of engaging in any species of trade or commerce, foreign or domestic,' and the first enquiry is, whether the purpose or business for which the Company known as the San Francisco City Water Works was formed, is embraced within the provisions of this section. The Company was organized, according to the language of its articles of incorporation, for the purpose of introducing pure, fresh water into the City and County of San Francisco, and supplying the inhabitants and the public buildings with the same, and the transaction of such other business relating thereto as might be necessary or proper. The purpose thus declared, it is contended, is not embraced within any of the terms of the Act. We do not think so. The language 'for the purpose of engaging in any species of trade, foreign or domestic,' is sufficiently comprehensive to include companies formed for the purpose contemplated by the company in question. Though the sale of water to be introduced is not mentioned in the articles of incorporation, it is evident that that was the object which the corporation had in view. It was to deal in water as a matter of business—to furnish the article to consumers upon consideration to be received—that the company was formed. *Water when collected in reservoirs or pipes and thus separated from the original source of supply, is personal property, and is as much the subject of sale—an article of commerce—as ordinary goods and merchandise.* Engaging in the business of furnishing it to the inhabitants of a city for equivalent considerations to be received, is engaging in 'a *species* of trade or commerce' within the meaning of the Act.

Heyneman vs. Blake, 19 Cal., 594.

The correctness of this doctrine as to property in water thus acquired and held, does not seem to have ever been seriously questioned, and it is in strict accord with the elementary rule, *cujus est solum,* ejus ~~*eque*~~ *est* usque *usquo ad coelum*, wherefore it is that a grant of land conveys to the grantee not only the 'field' or the 'meadow,' but all the growing timber and *water* standing and being thereupon; and a *stream of water* is therefore, as much the property of the owners of the soil over which it passes, as [of] the stones scattered over it."

Angell on Water Courses, Sec. 5, & C. C.

Under this same law, we have corporations organized and engaged in the manufacture of flour, of furniture, and several of them in the manufacture of machinery. As well might the State undertake to regulate the price at which the flour, the furniture, or the machinery should be sold as that at which this water should be sold, in the absence of any contract as to either.

II.

The Provision of the Act of 1858 as to the Mode of Fixing Water Rates is a Contract between the State and the Company, made for Valuable Consideration, and the attempt to Change that Mode by the Constitution of 1879 is in Conflict with the Constitution of the United States, and Void.

This corporation, the moment it was organized under the Act of 1853—the only one from which it derives its power to exist—became and was a person as clearly capable of making a contract within the scope of its authority—*i. e.*, relating to the business for which it was organized, that of engaging in trade and commerce by introducing and supplying water—as any natural person. The State was also capable of contracting, and it said to its citizens, also capable of contracting: if three or more of you will unite and form an artificial person under our general law which authorizes such an act, and through that artificial person will invest your capital in this particubusiness, the prosecution of which is necessary to our prosperity, and will accept the burdens imposed by this Act, we will give it the right to acquire property requisite for its corporate uses, if necessary, by the exercise of the power of eminent domain, and to lay and maintain pipes in the streets of the city upon the terms and conditions in this Act provided. One of those conditions is that the Company shall furnish water to the inhabitants for family uses, at reasonable rates, as long as the supply permits. Another is that it shall furnish water to the extent of its means, in case of fire or other great necessity, free of charge. Another is that the rates to be charged shall be fixed by arbitration, *i.e.*, by a commission in the appointment of which the City and the Company shall have an equal voice.

Nothing in this Act partakes of the nature of a charter. The Company is in no sense dependent upon it for its right to exist, or to carry on the very business in which it is now engaged; but all its provisions are in the nature of inducement to engage in that business, and of contract as to the terms upon which it shall be carried on.

It is a contract which comes clearly within the protection of Section 10, Art. I of the Constitution of the United States, and does not come within the line of any of those decisions where it has been held that the charter of a corporation, though in the nature of a contract, could be altered or amended, because the right to alter or amend had been reserved. It is not a part of the charter, and the right to amend has not been reserved.

And even if it should be true that the State in its sovereign capacity, and in the absence of a contract, had the right to regulate these rates; and therefore, instead of this provision in section four being a concession from the Company to the State, it was a concession accruing from the State to the Company, it is all the more entitled to this constitutional protection, for it is a consession made, not only as an inducement to enter upon the business, which of itself would be ample consideration, but also for a continuing consideration in the form of free water for certain purposes, without which the city would be at the mercy of the flames.

That such a contract can be made, and when made is protected by this provision of the Constitution, is most clearly expressed in the unanimous opinion of this Court in *Stone vs. Mississippi*, 11 Otto, 816. The contract invoked here is one affecting property rights, and the value of property, and not in any manner affecting the power of the State in matters of police, of public health, of public morals; and is not one bargaining away, in any sense, governmental power.

Mr. Justice Ross, in his dissenting opinion in this case (Record, p. 18), has so ably defined the relations of these parties, and the character of this contract, that we quote his language, even at the risk of repetition. He says:

"By incorporating and availing itself of the privileges of this Act, the Spring Valley Water Company became bound, among other things, to furnish water to the extent of its means, to the City and County of San Francisco, in case of fire or other great necessity, free of charge, and it has already been determined by this Court that the words 'other great necessity' include all waters necessary for sprinkling streets, watering public squares and parks, for flushing sewers, and for all like purposes beneficial to the public. But why was the company bound to furnish its waters for such purposes free of charge? Simply because by accepting the offer held out by the Act of 1858, and incorporating and availing itself of its privileges, it agreed—*contracted*—to do so, and was bound by the terms of the contract. By the exercise of no governmental power of which I am aware could the Spring Valley Water Works be compelled to furnish the City and County of San Francisco with water, free of charge, for any purpose. That obligation could, and did, only arise out of the contract. But the contract did not end there; for by it the Company also bound itself, and became entitled to furnish pure, fresh water to such of the inhabitants of the city and county as should wish to take it, so long as the supply should permit, for family uses, at reasonable rates and without distinction of persons, upon proper demand therefor—the rates to be charged for water so furnished to be fixed, however, in the manner specified in the Act. This right was a part and the principal part of the consideration the Company received for its agreement to furnish the city and county with water for the purposes mentioned, free of charge.

"The manner of fixing the rates was as much a part of the agreement between the Company and the State as was the agreement to furnish the public water for certain purposes free of charge. Both, as I understand it, rested upon contract alone—the one as much as the other, and both relating to property rights—to the terms upon which the Company should sell and dispose of the water it owned. * * * * * *

"If there was a contract between the State and the Company at all (and I understood the prevailing opinion to proceed upon the theory that there was), I know of no ground for saying that the clause relating to the fixing of rates to be charged for the water furnished by the Company to the inhabitants of the city and county was not a part of that contract. In my opinion it was a most material part of it, providing as it did for fixing the amount of money the Company should receive for its water."

If the position of defendants in this case is correct, then this contract has been not only amended, but it has been entirely swept away. Every guarantee which operated as inducement to and consideration for the investment of capital in this business has been blotted out. We are told that the people have done it by the adoption of new constitutional provisions, and consequently the Act of repeal is the fundamental law of the land.

Fortunately there are rights even above the Constitutions of States, and among them is that of having unimpaired the obligation of antecedent contracts. The people can no more abrogate a contract by constitutional amendment than by legislative enactment. The Constitution is itself a "law" within the meaning of that provision of the Constitution of the United States which we invoke. The prohibition runs against Constitutional provisions as well as legislative enactments.

Davis vs. Gray, 16 Wall., 203.

R. R. Company vs. McClure, 10 Wall., 511.

Dodge vs. Woolsey, 18 How., 331.

Jeff. B. Bank vs. Skelly, 1 Black, 436.

This is a more aggravated case of impairment of contract than that presented in *Dartmouth College* vs. *Woodward,* (4 Wheat. 518). There the attempt was merely to increase the number of Trustees, the Government to appoint the additional number, the corporators still to have a representation in the Board. Here the attempt is to abolish the Board of Commissioners entirely, and to substitute the Government officials in their place, giving the corporators no representation or voice in the premises.

The leading opinion of the Court below in this case, proceeds entirely upon the theory that the power to fix these rates, was one belonging exclusively to the State; that the provision as to the mode of doing it was merely a provision for the selection of agents of the State to exercise that governmental power, and that, in so far as it gave the plaintiff any voice in such selection, it was a mere privilege, which might be withdrawn by the State at any time. We have endeavored to show that this theory is wrong in principle, but even if right, the conclusion is erroneous, because the privilege, which the Court claims was granted to the Company, was one which the legislature had the power to grant, was granted for good and valuable considerations, was one affecting the value of plaintiff's property, and to take away which might utterly destroy that value.

This Court has several times held that a State may make a contract (even on the subject of the power of taxation) that it will not exercise the taxing power, or will exercise it only within certain limits, with respect to a particular subject, and that such a contract can not afterward be rescinded by the State. To this effect is:

Dodge vs. Woolsey, 18 How., 331.

Traders' Bank vs. De Bolt, Ib. 380.

" " vs. Thomas, Ib. 384.

Jeff. B. Bank vs. Skelly, 1 Black, 436.

McGee vs. Mathias, 4 Wall., 143.

Von Hoffman vs. City of Quincy, Ib. 535.

And in *Glover* vs. *Powell*, 2 Stockton, 211, where a statute had been passed declaring a stream navigable, and directing the removal of a dam therefrom, the construction of which had been authorized by a previous Act, the Court said: "Under the provisions of the Act of "1760, rights have become vested and valuable property has been "acquired. These rights and this property have been enjoyed under the protection of this Act for nearly a century past. The State "has participated in the benefits conferred. The property acquired "under the Act has been taxed for the support of the State and the "municipal governments." And referring to a subsequent statute, the Court said further: "It is in violation of good faith; it impairs "the obligation of a contract which has been enjoyed to the mutual "benefit of both parties, and it is therefore repugnant to the Con-"stitution of the United States."

Smith vs. *City of Appleton*, 19 Wis., 468, is a case where the Legislature, in providing for the issue of bonds in exchange for other bonds, had pledged the faith of the State that no new bonds of the city should be issued, except those issued for the purpose of paying its bonded debt. The only consideration for this pledge was the inducement that it would afford for investment in the bonds authorized in the Act—a consideration trifling in character compared to that found in the case at bar. And yet the Court said it "is a "most material and important one, insuring, as it were, the con-"tinued ability of the city to meet and discharge the bonds and "interest. When accepted by the creditors and the city, and new "bonds issued, it constituted a most material element of the con-"tract. It entered into and became a part of it, and as such is not "the subject of legislative repeal or amendment, so as to impair "the rights or diminish the security of the creditors without their "consent."

Even if there was a power to amend the Act of 1858 in this respect, the amendment must be reasonable, be made in good faith, and be consistent with the scope and object of the original Act.

Shields vs. Ohio, 5 Otto, 324.

Power to alter or modify anything can never be held to imply a power to substitute a thing entirely different.

Zabriskie vs. H. & N. Y. R. R. Co., 3 C. E. Greene, 192.

Or, as said by Justice Story, in *Allen* vs. *McKean* (1 Sum., 277): "An authority to alter or modify these powers can never be fairly construed into an authority to take them away from his trustees, and confer the same powers on other persons."

III.

The provision of the Constitution of 1879, in regard to the duty of supplying water and the mode of fixing rates therefor, is one depriving plaintiff of its property without due process of law, and in conflict with Article V of the Amendments to the Constitution of the United States.

IV.

It is also one which in effect takes Private Property for Public Use without Just Compensation.

The first of these points was specially, and the other incidentally, argued in the State Court, by my colleague, Mr. F. G. Newlands, and although the argument was oral and elaborate, the points were so ably presented upon principle and authority that I feel justified in adopting it at length. He thus presents the case:

"The object of government is to secure to man life, liberty, property and the pursuit of happiness. Every man gives up that individual liberty which he has in a state of nature, in order to obtain from society in general the protection which it affords. And society, acting in the aggregate, through its government controls the individual, his life, liberty and property; and this power, inherent in every sovereignty, the power of the government over men and things, absolute unless limited by society itself, is called the *Police Power*. And the question is, whether this power has any limits in our form of government. It has none in England. We speak of the English Constitution. ~~There is no such thing~~. ~~It is a mere fiction~~.

It consists simply of the traditions of the English people. In England the powers of the Government are vested in the King and in Parliament, consisting of the House of Lords and the House of Commons. Society there acts through them, and the life, liberty and property of the individual are subject to their absolute control. Parliament can by an Act deprive a man of his life or liberty; it can by an Act take away his property and vest it in the State, or in another. It can destroy the obligation of contracts. It can if it chooses do away with the Courts, and itself perform judicial functions. In it are aggregated all the powers of society. Its power is so transcendent that it has been called the omnipotence of Parliament. But the limitation which there exists in favor of the individual and against the power of society represented in the government is, that one House of the English Parliament, the House of Lords, is a privileged body, consisting of men of rank and wealth, naturally conservative, without whose consent no Act of Parliament can be adopted, a body which necessarily protects property, because it is most interested in its conservation.

"I say that in England the police power, the power of government, is unlimited. But is it so in this country?

"Our forefathers recognized the axiom of political economy, that self-interest is the foundation of society; that it is instinctive in man to acquire, in order to advance his own comfort, promote the welfare of his family, and secure to the objects of his love and affection, even after his death, the rewards of his toil. They recognized the fact that this instinct, properly protected and guarded, could be made a factor in the advancement of civilization and progress, and the promotion of art and science. They determined to establish a Republic. Republics had been failures, and simply because they were not able to adequately protect life, liberty and property. The multitude and the crowd became the tyrant, that many-headed despot more dread and terrible than the Czar of Russia or the Sultan of Turkey. Our forefathers being English, or of English descent, modeled our government in a large measure after the form of government in the mother country. We had our President and Congress; the President corresponding to the King, the House of Representatives to the House of Commons, and the Senate to the House of Lords. But we had no privileged body to which the people, and the men of property, particularly, could look for the protection of their interests, and so they determined to put society itself in bonds, and this they did in a written Constitution, adopted by the whole people, in which it was provided that no State should pass a law impairing the obligation of contracts; that private property should not be taken for public use without just compensation; that no person should be deprived of life, liberty, or property, without due process of law; and, finally, as this might be deemed merely a limitation upon the power of the General Government itself, it was declared in the Fourteenth Amendment that *no State* should deprive any person of life, liberty or property, without due process of law. The Constitution of the United States, then, recognizes the preservation of property as one of the primary objects of the social compact. Society says to the individual, you shall be fully protected in your property, not simply in the title, but its use and enjoyment, and all the incidents of ownership; and this it says in the Constitution which contains the "fixed and permanent will of the people," and which limits their own powers, whether sought to be exercised through Congress or through the Legislatures or Constitutional Conventions of the various States.

"This idea was incorporated in the Constitution of California, adopted in 1849, in which it was declared that among the inalienable rights of men are those of acquiring, possessing and protecting property.

"I assert then that water is property, and that the Spring Valley Water Works can not be deprived of it without due process of law —by which it is to be understood, law, in regular course of administration through Courts of Justice. I assert that the Spring Valley Water Works is a trading or commercial corporation; that it is engaged in the business of selling water; that as one of the incidents of the ownership of water, it has the right to fix the price at which it shall sell, except so far as it has contracted that right away, or modified it under the general Act of 1858; and that the new Constitution which declares the use of all water to be a public use, and provides that the rates or compensation to be collected by any corporation, association or person, for water supplied to any city, city and county, or town, and the inhabitants thereof, shall be fixed by the Board of Supervisors or other governing body, thus subjecting the property of this corporation entirely to the will of its customers, is in violation of the constitutional limitation in question; and, I say further, that if the power which is asserted in the new Constitution can be exercised over the property of this company, it can be exercised over all the property in the State; that there is no protection whatever in the constitutional limitations under consideration; and that the State has only to declare that lands in this State are a public use, to fix the rent of land, or the price at which it shall be sold; that it can in the same way fix the price of gas, of bread, flour, wheat, hay, hardware, dry-goods, clothes, or anything which the public generally use; that in the same way the price of labor can be fixed, and thus the absolute tyranny of society over those who have anything, can be asserted and maintained.

"And now, may it please your Honors, I am obliged to meet, in presenting this view of the case, the authority of *Munn* vs. *Illinois*, popularly known as the Chicago Elevator case, which apparently militates against the position I take. The case was one where the Constitution of the State of Illinois declared all warehouses for the storage of grain in cities of not less than one hundred thousand inhabitants, to be public warehouses; and gave to the Legislature the right to regulate the charges which they should impose upon their customers. The Legislature did act, and fixed the rates, and the point was then raised that this was in violation of the Federal Constitution, which declares that no man shall be deprived of his property without due process of law; that to deprive a man of the use of his property and the right to fix the compensation which he shall receive for its use, is to deprive him of the property itself, because it deprives him of all that makes his property valuable. The Court held, however, that the Act in question did not deprive Munn of his property; that it simply regulated the use; that that use could be regulated at common law; and it was not the intention of the Federal provision in question to take away from the State the regulation of property affected with a public interest. And the proposition is then laid down that when one devotes his property *to a use* in which the public has an interest, he in effect grants to the public an interest *in that use*, and must submit to control by the public for the common good, to the extent of the interest which he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control.

"Here then was Munn, a private citizen who had erected with his own money a warehouse upon his own land, and used it for storing the grain of his customers. The State declares it to be a public warehouse, and takes from him all control as to the price which he shall charge for the use of his property and assumes the control itself, and the Court apparently supports and affirms this remarkable assumption of power. This decision went far beyond the claim of control of the State over corporations by reason of the power reserved in their charters, and declared in effect that whenever a man employs his property in such a way as to be generally useful, that moment he surrenders to the public all control over the price which he shall charge for its use. It asserted again the omnipotence of society and the complete and absolute subjection of the individual to its decrees—and this too without regard to the spirit and intent of the Constitutional limitations in question, as I discern them by the light of experience and history.

"But I leave this case, calling the attention of your Honors, however, prominently to this consideration, namely, that we should not determine questions of this kind by the cases arising in England, for the reason that there the power of the Government is omnipotent; there, society can act upon the individual in any way it sees fit; whereas, we have thought proper to limit the powers of society itself. Of what avail is it to inquire whether the public in England regulate the use of property affected with a public interest, or to investigate the principles regulating the control in that country over the use of ferries, mills, and wharves, when we must admit the absolute power of the Government there over the property of the subject? The greater must include the less. The power to take away or destroy must imply the power to use or regulate. To draw analogies from such sources is to declare that the less is equal to the greater; that limited power is equal to absolute power.

"But, even admitting the correctness of its doctrine, it extends only to the *use* of property; it does not permit the public to take the property itself without due process of law, or without the exercise of the power of eminent domain.

"*Justice McKee.*—Is this constitutional provision anything more than an attempt to regulate the use?

"*Mr. Newlands.*—I think it is. Here is the question: Is water property? I know that it has become a popular idea that there is no property in water, that water is free as air. We admit that, so long as it is moisture in the clouds: But water stored in the artificial lakes of the Spring Valley Water works and in its reservoirs, and conveyed in its pipes to the doors of its consumers, is subject to its dominion and control, and is its property, just as absolutely as its lands or its pipes. The old doctrine of water in running streams has been cited, to the contrary. That doctrine can be safely admitted. No man has property in the water of a running stream. Any person can use it, and all that any man can have is the right to use it. But when water is reduced to the subjection, control and possession of an individual, it is his property. It has been said that there is no property in wild animals—animals *feræ naturæ.* That is true. But if I capture a lion and put him in a cage, he is my property, as much so as my horse or dog.

"And this is what the Spring Valley Company has done. It has caught the water falling from the clouds and stored it in its artificial lakes and reservoirs, which it owns by an absolute title, and conveys it to the doors of its customers in its pipes, which it owns by an absolute title. Who will say that this water is not property, and just as much subject to the protection of the Federal Constitution as any other property can be?

"In the case of *Heyneman* v. *Blake* (19 Cal., page 595), the Court says, with reference to the San Francisco City Water Works, organized also under the Act of 1853:

"'Though the sale of water to be introduced is not mentioned in the articles of incorporation, it is evident this was the object which the corporation had in view. It was to deal in water as a matter of business, to furnish the article to consumers upon considerations to be received, that the company was formed. Water, when collected in reservoirs or pipes, and thus separated from the original source of supply, is personal property, and is as much the subject of sale—an article of commerce—as ordinary goods and merchandise. Engaging in the busines of furnishing it to the inhabitants of a city for equivalent considerations to be received, is engaging in "a species of trade or commerce," within the meaning of the Act Ice companies organized to furnish the inhabitants of a city with ice, and gas companies organized to furnish them with gas, and the company in question organized to supply them with water, all stand upon the same footing. They are engaged in a species of trade or commerce, though not in the technical acceptance of the terms, trading or commercial corporations.'

"The Spring Valley Water Works was organized under the Act of 1853, as a trading and commercial corporation, and is dealing in its commodity, water, just as any other corporation organized under that Act can deal in ice or gas, or any other article of merchandise.

"My position, then, is, that the doctrine of *Munn* v. *Illinois*, even though assumed to be correct, does not apply to this case; that that was a case where the Legislature was simply regulating the use of warehouses. It did not take the warehouses themselves for the public *use*. Would it be contended for a moment that the State Constitution, by a declaration that warehouses were public warehouses, could take them or the wheat in them at a price to be fixed by itself? This distinction then, must be kept prominent. The Illinois Constitution simply regulated the *use* of the property. Our Constitution deprives the corporation of the property itself. It is true that our Constitution declares that 'the use of all water, * * * * etc., 'is hereby declared to be a public use,' etc., and provides that 'the compensation to be collected for the use of water shall be fixed,' * * * * etc. But it must be remembered that the use in this instance consists in taking the thing itself. You might, in the same sense, speak of the use of flour, or wheat, or rice, or gas, or hardware.

"Water is property. The Federal Constitution says no State shall deprive a person of property without due process of law. This State seeks, through its Constitution, to deprive this Company of its water without due process of law. Is not the conclusion irresistible that the State Constitution is in conflict with the Federal?

"There is another difference between this case and that of *Munn* vs. *Illinois,* to which I must allude, and that is this: The doctrine is laid down in that case with reference to property devoted by the owner to a use in which the public has an interest, that he may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control. Even this poor right does not exist in the case of the Spring Valley Water Works, for it is provided in section 2 of the Act of 1858, that:

"'All reservoirs, canals, ditches, pipes, aqueducts, and all conduits heretofore built, or that hereafter may be constructed by any corporation formed under this Act, or claiming the privileges, rights or immunities herein granted, or any of them, shall be used exclusively for the purpose of supplying any city and county, or any cities or towns, in this State, or the inhabitants thereof, with pure fresh water.'

"It thus appears that the property of this company is, by its organic law, forever dedicated to the use to which it has been appropriated, and that even though the power given to the Board of Supervisors by the New Constitution be exercised to the point of destruction, this company cannot discontinue the use; and thus, as is asserted in *Munn* v. *Illinois,* withdraw its property from the public control.

"But it may be claimed that this case involves the exercise of the power of eminent domain; that the State has decreed that the property is necessary for the public use, and has pointed out the manner in which the compensation shall be fixed and determined. To this I answer that in all the States the doctrine has been declared that a proceeding to comdemn private property for public use is judicial in its character, and that the party in interest is entitled to have an impartial, independent and fair tribunal, and the usual rights and privileges which attend judicial investigations. In some of the States the power is given to the Courts not only of determining the compensation, but also the public necessity. In others the State itself determines the public necessity, and leaves the determination of the compensation to a fair and impartial tribunal. In this State it has been determined (in the case of *Spencer Creek Water Co.* v. *Vallejo*, 48 Cal., p. 70) that proceedings to condemn private property for public use involve the exercise of judicial power, and that such power is vested in and must be exercised by the Courts organized under the Constitution. The power is here vested in the Board of Supervisors, who are directly interested in the proceeding, for they are presumably consumers of water themselves, and they are the agents of the City and County of San Francisco, the largest consumer, and the political representatives of all the consumers of this company. It is an elementary principle of natural justice that no man shall be a judge in his own case. This doctrine has been asserted in England repeatedly; so much so that, notwithstanding the absolute power of Parliament, one of the Judges of England went so far as to declare that an Act of Parliament would be void which would make a man a judge in his own case. This provision of the Constitution, then, violates the general doctrine asserted by the Courts of all the States, that the power must be exercised by some fair and impartial tribunal, and particularly violates the doctrine laid down in this State, that that tribunal must always be one of the constitutional Courts of the land.

"But it is claimed that this extraordinary power can be exercised under the right reserved in the Constitution to alter, amend or repeal all general laws for the formation of corporations. Whilst I fully agree with my associate that the Act of 1858 is not a charter, but is simply an Act containing a contract between the State on the one hand and water companies organized under the law of 1853 on the other, which the State cannot violate, I shall assume, for the purposes of this argument, that the Act of 1858 is simply amendatory of or supplementary to the Act of 1853, and is subject to the reserved power of the Constitution, and I shall inquire whether that power can be exercised to the extent which is claimed here. We will assume, then, that the power is reserved in the Act of 1858 to alter, amend or repeal it, and that such power can be exercised either by an Act of the Legislature or by the people through the adoption of a new Constitution. How far can that power be exercised? The courts have unanimously held, wherever this power was under consideration, that the amendment must be reasonable and not oppressive; must be made in good faith, and be consistent with the scope and object of the original Act. This doctrine was laid down in *Shields* vs. *Ohio*, a case recently determined by the Supreme Court of the United States, and to be found in 5 Otto. It was also asserted in the case of *Commonwealth* vs. *Essex*. (13 Gray, Mass. 239.)

"In that case, the doctrine was laid down by the Court that, from the earliest times the right of the public to the passage of fish in rivers and the private rights of riparian proprietors incident to and dependent on the public right, were subject to the regulation of the Legislature, and they held that the Essex Company, having acted under its charter, and having, in accordance with its provisions, indemnified the owners of fisheries above its dam for the damages done to them by its construction, could not be required by a subsequent act to construct fish ways for the free passage of fish up the stream. Why could not that power be claimed under the reserved power? The Legislature had the right to amend, alter or repeal the law under which this company was incorporated. That law gave it the privilege to erect a dam upon the condition that it should pay the riparian proprietors above, damages for injuries to their fisheries. It did pay. Why could not the State afterwards, in the exercise of a public right, of the police power—the power to regulate and control the passage of fish in rivers—declare that this company must construct a fish way? They did so. Yet the Supreme Court of that State held the amendment to be unconstitutional, and the Court say: 'It seems this power must have some limit, though it is difficult to define it.' And after supposing some extreme cases, it lays down a general rule to this effect, that where under power in a charter rights have been acquired and become vested, no amendment or alteration of the charter can take away property or rights which have become vested under the legitimate exercise of the powers granted, and the Court declares in the following words that:

"'After the Government, acting in behalf of the public, and also of all those riparian owners whose fish rights would be damnified by the defendant's dam with the fish way as it was, entered into a solemn and formal contract with the defendant company to exempt them from the obligation of making and maintaining a suitable and sufficient fish way, if such were practicable, by indemnifying all those damnified in their several fisheries, and the defendant company had executed their part of the contract, by the payment of a large sum of money, it was not competent for the Legislature, without any change of circumstances, under their authority to amend and alter the charter of the company, to pass a law requiring them to do the acts from which by the terms of such contract they had been exempted, and therefore that the amendatory act was null and void.'

"So we say that the Government, acting on behalf of the public, entered into a solemn and formal contract with this Company, by which the Company, on the one hand, agreed to furnish its water free to the public in case of fire or other great necessity; and, on the other hand, the Government agreed that the Company should have a voice in the fixing of its rates. The public have received their consideration; they have received free water for a long period of time. Can they now escape the obligation imposed upon them to permit the Spring Valley Water Works to appoint a portion of the Commissioners who are to determine its rates?

"So, also, in the case of *Sage* v. *Dillard*, (15 B. Munroe), where the Legislature, in the exercise of the reserved power, passed an act adding sixteen to the number of trustees then in office of the Western Baptist Theological Institute, and itself named the additional trustees. The Court held that the act, notwithstanding the power reserved in the original act of incorporation to amend and repeal, impaired the obligation of a contract, that it did not come 'within the scope and meaning of the powers reserved in the original act.'

"So also, a similar doctrine is laid down by Justice Story himself, who was the author of this doctrine of the reserved power. Your Honors will recollect that in the *Dartmouth College* case, the charter of the college was determined to be a contract, and Justice Story said that the State could not change it unless the power was reserved. This decision was the origin of the constitutional provision subsequently inserted in all State Constitutions that Acts of incorporation shall be subject to alteration, amendment or repeal. Yet, afterwards in considering this very reserved power, in the case of *Allen* v. *McKean* (1 Sumner, p. 277), where the reserved power was exercised by the Legislature of the State of Maine, by adding to the number of trustees of Bowdoin College and naming them itself, Justice Story held that the amendment was not reasonable, that it impaired the obligation of a contract, and that the act in question was invalid.

"There are many other cases to the same effect, and the conclusion derived from their reading is obvious. It is, that this Act of 1858 is to be construed just as if the doctrine were inserted in full in the Act itself. Not simply the words, "the power is reserved to alter or amend this Act, but, "the power is reserved to alter or amend this Act reasonably and not oppressively, in good faith and consistently with the scope and object of this Act."

"Now, I ask is the alteration in the charter of this company effected by the New Constitution, a reasonable one? Certainly no complaint can be made as to the fairness of the Act of 1858. Here was the Spring Valley Company, a commercial corporation, dealing in its commodity, water; and here, on the other hand, was the public, whom it was to supply. Instead of leaving to the owners of the commodity the right which usually belongs to him of fixing its price, it was agreed in and by the Act of 1858 that the price to be paid should be fixed by arbitration, by a Commission, which the Company and the public should jointly select. This was reasonable and just. It prevented extortion on the one side; it prevented destruction on the other. What change does the new Constitution make? It vests the power of fixing the price in the Board of Supervisors alone. It does not simply provide that the Board of Supervisors shall appoint a Commission which presumably will be fair and impartial; but it puts the power in the hands of the Supervisors, who have both in their individual and representative capacity, an interest adverse to this Company.

"Is this fair or just as between man and man? Is this a reasonable alteration of the contract which existed between the public and the corporation? Is it to be presumed that this body will act fairly?

"Let me cite a few facts by way of illustration. At the last municipal election there were four parties in the field; the New Constitution, the Workingmen's, the Republican, and the Democratic parties. The convention which first met compelled its candidates to appear before the convention and pledge themselves solemnly, without inquiry into the facts as to whether the water rates were unreasonable or not, to reduce them twenty per cent. And there was but one man of all the candidates who had the manhood to refuse, who realized that he was about to act judicially in this matter, and that it would be inconsistent with his honor as a man and legislator to take such a pledge.

"The next convention exacted from its candidates a pledge that they would reduce the rates 25 per cent.; another convention that they would reduce the rates 30 per cent.; another convention that they would reduce the income of this company to but $500,000, and that one-half of that sum should be imposed upon the city, and one-half upon the rate-payers; and thus the works of this company were put up at auction, and sold to the lowest bidder; and these were not mere party platforms, which have been termed molasses to catch flies, but solemn pledges intended to be binding on the honor and conscience of individuals. The effect of carrying out these pledges would have been to cripple, if not destroy, this company. If the most radical, the company would not have had sufficient to pay running expenses and interest on its indebtedness. And the least of the proposed reductions would have diminished the dividends upon its capital stock to a nominal sum.

"I cite these facts as illustrations to show that political parties will never deal justly with this subject. The power is one that ought to be exercised by a Court, for it involves the exercise of eminent domain, the determination of what is a just compensation for property taken for public use; and this power ought always to be given to a fair and impartial tribunal.

"It must be remembered that we are not considering the possible action of the Legislature of the State, one of the co-ordinate branches of the Government, drawn from the whole people, and less likely for that reason to be affected by the passion or prejudice or interest which may exist in a particular locality, but we are considering the possible action of an inferior legislative body, reflecting the dissatisfaction, the passion and the prejudice of the community which they represent and which this Company serves. You must bear in mind that there will necessarily be constant friction between this Company and the community, whatever the rates may be, whether they are the existing rates or one-tenth of such rates, for this Company occupies the position of a tax-gatherer. It is attempting to collect its rates, and a great many of the public are endeavoring to escape them, and the Company is often compelled to resort to summary measures to collect. Tax-gatherers are never popular, even when they represent the people themselves, and are collecting taxes to be applied to the common good. In every country taxes are resisted. The man who desires the Government to protect him, endeavors to escape contribution to its expenses; and thus there is a constant tendency to the destruction of Government and disintegration of society. If men can thus act with reference to the Government in whose prosperity they are directly interested, how will they act in reference to this Company in which they have no personal interest.

"Friction will inevitably exist, and yet the control of the rates of this company, which has expended everything in the enterprise—nothing having been given by the public—is given to that body, which is in intimate relationship with the very people who are dissatisfied, and always will be dissatisfied—who represent them politically and are subject to the influence of their passion and prejudice, and whose every hope of public favor and political preferment depends on meeting their demands. Can such a body act justly?

Does not experience teach us that a body so organized and vested with so extraordinary a power will either destroy or compel those most interested to stand and deliver, and then impose on the community, as an additional burden, the price of their honor? Will not such a power inevitably fall into the hands of the speculators in politics, who will make their market out of the hostile sentiment which they themselves create and aggregate against private capital? I repeat it, and I repeat it solemnly, that the power of the public, if asserted to the extent claimed to be lawful, over private capital invested in enterprises affecting the public generally, will result either in its destruction or in its protection, at the expense of public virtue. The prizes are too tempting. All the corrupt and evil forces of politics will be at work to influence and excite the people, and to forge public sentiment into a thunderboldt of destruction; which will be held over the head of shivering capital, and force from it the price of safety and liberty.

"But let us see in what other particulars the Constitution alters and amends the contract between the public and this Company, contained in the Act of 1858. That Act provides that the decision of a majority of the Board of Commissioners shall determine the rates to be charged for water for one year, and until new rates shall be established. The new Constitution declares that the rates shall be fixed annually by the Board of Supervisors, by ordinance, and shall continue in force for one year and no longer. It also declares that any corporation collecting water rates otherwise than as so established shall forfeit its franchises and water works to the city for public use.

"Suppose the Board of Supervisors should fix rates which would be ruinous? The Courts could not interfere, for if the Supervisors can exercise this power at all it is a political or legislative power, and the Courts cannot control its exercise. For protection against such abuse of power the Company would have to appeal to the people at the polls. Meanwhile the stock of this corporation, always sensitive, will fall in the market, those who have money borrowed on it will lose their all, and the Company will have to wait for two years in the hope—which will probably prove vain and illusory—of having the wrong righted.

"Suppose, on the other hand, the Board of Supervisors should be divided in opinion, standing six to six? The Courts could compel them to act, but it could not control their discretion. They would thus be unable to pass any Ordinance fixing rates. Then after June there would be no rates. What, then, would be the result? If the

Company should charge what it should deem reasonable rates, or charge the rates which were fixed by Ordinance for the previous year, it would by the terms of the New Constitution forfeit its franchises and works to the city.

"What, then, would be the position of this Company? It would have no revenue; it could not collect a single rate, yet it would, under a strict construction of the Act of 1858, as amended by the new Constitution, be compelled under Sec. 4 to supply water to the inhabitants of this city, 'so long as the supply permits,' and it would not be enabled to devote its property to any use which would be more profitable, for the property is by Sec. 2 forever dedicated to the use to which it has been appropriated.

"These, then, are the changes effected by the new Constitution. Are they reasonable or just?

"Let us suppose cases of other amendments in the Act of 1858, and then draw the parallel.

"This Act provides, among other things, that the Company shall furnish water to the city in case of fire 'or other great necessity' free of charge. These words have been determined by this Court to apply to all municipal wants except the domestic uses of water in public buildings. There is, then, apart from the change claimed to be effected by the new Constitution, one use for which the city must pay, namely, water supplied to public buildings. And I will say here, parenthetically, as an illustration of the justice with which the authorities deal with this Company, that notwithstanding that decision, not a dollar has ever been paid to this Company for water used for public buildings. But suppose the Legislature should amend the Act of 1858, and provide that Water Companies should furnish water free for all municipal purposes, would that be a reasonable amendment? Wouldn't it take this property, which the Company now has the right to charge for—the water used in public buildings—away from it without due process of law, and without just compensation? Would it not impair the obligation of the contract by compelling the Company to furnish more free water than it contracted to do?

So we claim that this Company is dealing in a commodity for which it has a right to fix its own price, except so far as it has contracted that right away by the Act of 1858. Any change in the mode or manner of fixing the price, not only breaks the obligation of the contract, but deprives the Company of its property without due process of law.

"So, also, by the Act of 1853, which is also subject to alteration and amendment, the right is given to stockholders to select their trustees; and it is provided that the trustees must be stockholders. Suppose the Legislature should by amendment provide that all of the trustees should be selected by the Legislature, or by the Board of Supervisors, or elected by the people of San Francisco, or that the Supervisors should be trustees, would such amendments be reasonable, and would they be upheld as valid?

"Suppose that the very charter of this Company should provide that any time the municipality should have the privilege of buying the water works of this Company at a price to be fixed by arbitrators, one to be appointed by the Company, one by the municipality, and the third by the two, could the Legislature, under this reserved power declare that the Board of Supervisors should select entirely those arbitrators, or could it itself fix, or provide that the Board of Supervisors should fix the price which should be paid for the property?

"I make these suppositions to illustrate the doctrine that the reserve power is not unlimited. The case we have here is just as extreme as any we have supposed. If the Legislature cannot amend a charter which provides that the public shall take *the water works* at a price to be fixed by arbitration, so as to give the buyer the exclusive right to fix the compensation, so also it cannot amend a charter which provides that the public shall take *the water* at a price to be fixed by arbitration so as to give the buyers the exclusive right to fix the compensation.

"Water is property, just as much so as the water works, and both are under the protection of the Constitutional inhibition.

"If the Legislature should by an amendatory Act select the trustees of this Company, or provide that the Supervisors should be trustees, the amendment would undoubtedly be declared unconstitutional, as impairing the obligation of a contract, and as taking away property without due process of law. For certainly it is an empty thing to give to the stockholders of this Company, through the artificial being which they compose, the simple title to the property, and yet give the absolute management and control of it to the State. And yet that power could not have been exercised more effectively than it has been in this case. For while the trustees have not been displaced, and while the Supervisors have not been substituted as trustees, yet they have the absolute control over the profits of this Company. And that control involves the power to inquire into every detail of management, to criticise it, to reject this expenditure and that, and thus absolutely enjoy and own the property in the only sense in which it can be enjoyed or owned by any one, in its use, management, and profits.

"But I may be asked, how are the evils of corporation and aggregated capital to be corrected. They are menacing the sovereignty of the State. They have in their power the happiness and prosperity of the citizen. To this I answer, that if these evils exist, they can be modified in other ways. As to aggregated capital in the hands of the individual, we can trust to the leveling effects of time. The statute of descents and distributions will eventually destroy the proudest fortune. As to those artificial persons called corporations, who can die no death except such as the law imposes, no one can doubt that they have been the most potent agencies for the advancement of our great enterprises, national and local. The Government has seen fit, instead of taking up such enterprises itself, to submit then to private corporations, giving them in some instances the powers of government, and in a few instances aid in money and credit. Where one these enterprises has succeeded, many have failed, and the country is strewn with their wrecks.

"If the country has reached that point of national prosperity which enables it to do without the aid of corporations, let it provide that none shall in the future be formed, or let it modify their powers and circumscribe their capital. But, in justice and fairness, such power should not be exercised against existing corporations which have entered upon their work relying upon the public faith. If, on the other hand, existing corporations are employing their powers and property to the point of oppression and exaction, then let the Government exercise the power which no one doubts, the power of eminent domain, and condemn either the property or its use for the general good by process of law through those impartial tribunals, the courts of the land.

"The war which is at present being waged against corporations and aggregated capital is but the beginning of the end. Precedent will beget precedent, abuse will beget abuse, and this contest is but the forerunner of the conflict which is impending, and for which all the forces of society, good and bad, are marshaling themselves, the the war of improvident against the provident.

"It was the intention of our Federal Constitution to avert such evils. It was designed to protect the provident in their acquisitions, and to save the nation from its own fury. Property was placed under the protection of the courts, those elevated tribunals lifted above passion and prejudice, unaffected by considerations of political preferment or public popularity, its members selected from a learned profession, conservative in disposition, and engaged in the constant study of the just relations of man to his fellow man, the individual to the State.

"To take this away, to vest in the political branch of the Government the power, whenever property is used in a manner which makes it generally useful, to regulate its use and to fix the compensation therefor, is to strike down this constitutional protection. It may result in temporary good to the public, but its evil effects are bound to ensue, and they will be lasting.

"It is time to pause and consider, lest in our endeavors to check and limit the alleged insolence and power of aggregated capital, we subject all the property of individuals to a power still more to be dreaded—the unlimited power of the many over the individual—a power which our Federal Constitution intended to and did limit.

"The amendment or alteration claimed to have been made in the law in this case is also unreasonable, because it is in direct violation of that law of natural justice which is elementary, and which has been maintained in all the decisions of Courts from the earliest period to the present time—that *no man shall be judge in his own case.*

"The plaintiff, at the invitation of the State, commenced dealing in a commodity for which there was a great public necessity, under the guarantee of the State that it should have an equal voice with those who became consumers of the commodity in fixing the price at which it should be furnished for all those purposes which were a necessity, and that when furnished for other purposes, the question of price should be left, as in other cases, to the ordinary laws of trade—the vendor and vendee could deal with each other as they pleased. But now comes the State and says:

"'You shall be compelled to sell this commodity for all purposes for which it may be demanded at a price to be fixed by the vendee alone; you shall neither refuse to furnish nor have any voice in fixing the price, but you shall take such price as those who buy from you may choose to offer.'

"By the change which is claimed to have been made in the law, the rate-payers, through their representatives, are made sole judges of the value of the commodity which we are compelled to furnish to them. We submit that upon principle as well as upon authority this cannot be denied; wherever bargain ends and adjudication commences, a party in interest must not sit in judgment."

SUMMARY OF POINTS AND AUTHORITIES.

I.

Plantiff is a trading corporation under the laws of the State of California—engaged in a species of trade and commerce.

Heyneman vs. Blake, 19 Cal., 594.

II.

The water in which plaintiff deals, collected in reservoirs, upon its own land, and pipes of its own construction, is private property, as much an article of trade and commerce as goods, wares, and merchandise.—*Ib.*, and

Angell on Water Courses, Sec. 5.

III.

In the absence of contract the State would have no right to interfere in fixing the price at which this property should be sold, or to demand or have any of it for public use "free of charge."

IV.

Section 4 of the Act of 1858, "for the incorporation of water companies," constitutes a contract between the State and the Company, wherein for good consideration it is mutually agreed that the State and the Company shall have an equal voice in fixing the rates at which the water shall be sold for family uses and municipal purposes, and the obligations thereof cannot be impaired by subsequent legislation or constitutional provision, without a violation of Section 10, Article 1, of the Constitution of the United States.

Stone vs. Mississippi, 11 Otto, 816.
Davis vs. Gray, 16 Wall., 203.
R. R. Company vs. McClure, 10 Wall., 511.
Dodge vs. Woolsey, 18 How., 331.
Traders' Bank vs. De Bolt, Ib. 380.
" " vs. Thomas, Ib. 384.
Jeff. B. Bank vs. Skelly, 1 Black, 436.
McGee vs. Mathias, 4 Wall., 143.
Von Hoffman vs. City of Quincy, Ib. 535.
Glover vs. Powell, 2 Stockton, 211.
Smith vs. City of Appleton, 19 Wis., 468.

V.

The provision of the Constitution of 1879 in reference to the mode of fixing water rates is an attempt to impair the obligations of the contract found in the Act of 1858, and is void.

See cases last above cited.

VI.

If there be power to amend, the amendment must be reasonable, be made in good faith, and be consistent with the scope and object of the original Act. It is not a power to substitute one thing for another, or to take a right from one party and confer it upon another.

Shields vs. Ohio, 5 Otto, 324.

Zabriskie vs. H. & N. Y. R. R. Co., 3 C. E. Greene, 192.

Allen vs. McKean, 1 Sum., 277.

Commonwealth vs. Essex, 13 Gray, (Mass.) 239.

Sage vs. Dillard, 15 B. Monroe, (Ky.) 353.

Art. XIV considered as an alteration or amendment of the Act of 1858, is unreasonable and oppressive.

The Act as altered gives the power of fixing the rates of water to the Board of Supervisors, who are directly interested, for they are presumably consumers of water themselves, and they are the agents of the City of San Francisco, the largest consumer, and the political representatives of all the customers of this company. It is impossible for such a body to act justly. The Act as amended, then, substantially gives to the buyer the right to fix the price of water, and even though the price should be unsatisfactory, and even if no price should be fixed (for the rates are to be in force for one year and no longer), it compels the company to continue the supply, and does not permit it to divert its property to any other use; and all this subject to the penalty, in case of refusal, of forfeiture of the franchise and water works to the city.

It cannot for a moment be contended that this alteration comes within the principles regulating the exercise of the police power, or the power of eminent domain, or the power reserved to alter or repeal the Act of Incorporation. It means confiscation and nothing less.

VII.

The police power is the power of Sovereignty, the power of the State over men and things. It is absolute, except so far as it is restricted by constitutional limitation.

Mr. Chief Justice Taney in License Cases, 5 Howard (U. S.), 583.

VIII.

In this country the Federal Constitution limits the police power of the State as well as the General Government. It is declared that no State shall pass a law impairing the obligation of a contract; that private property shall not be taken for public use without just compensation; that no person shall be deprived of life, liberty or property without due process of law, and that no State shall deprive any person of life, liberty or property without due process of law.

Constitution of U. S., Art. II, Sec. 10.

" " 5th and 14th Amendments.

IX.

Art. XIV of the new Constitution is in conflict with the Federal Constitution. It deprives the Spring Valley Water Works of its property without due process of law.

By due process of law is to be understood law in regular course of administration through courts of justice.

Sinking Fund Cases, 9 Otto, (U. S.) 737, and cases cited.

X.

The doctrine laid down in *Munn* vs. *Illinois,* 4 Otto (U. S.), 113, s based upon English precedents. They furnish no analogy, for in England the police power is unlimited. The power of Parliament over men and things is absolute.

1 Blackstone's Com. 160.

Van Horne's Lessee vs. Dorrance, 1 Dall. (U. S. C. C.) 304.

But assuming, for the purposes of argument, that this doctrine is correct, it cannot be applied here, for two reasons:

1st. *Munn* vs. *Illinois* applies only to the use of property. Art. XIV of the Constitution takes the property itself without due process of law. Water stored in the artificial lakes and reservoirs of the Company is property, just as much so as the Water Works.

Heyneman vs. Blake, 19 Cal. 593.

Could the State, by the adoption of a Constitution declaring all water works in the State to be public water works, take them at prices fixed by itself?

2d. The doctrine of *Munn* vs. *Illinois* must be applied in its entirety or not at all. That doctrine asserts that the owner of property devoted to a use in which the public has an interest may withdraw the grant by discontinuing the use, but so long as he maintains the use he must submit to the control. But under Section 2 of the Act of 1858, the property of this Company cannot be diverted to any other use, even if the control should be exercised destructively.

XI.

It is an elementary principle of natural justice that no man shall be a judge in in his own case—and yet those adversely interested are authorized by this change to sit in judgment on the rights, property and revenue of this Company. In the case of

King v. The Inhabitants of Yarpole, 4 Term R,. p. 71,

The rule was laid down that on an appeal to the Sessions against an order of removal, those Justices who were rated to the relief of the poor in either of the contending Parishes could not vote.

See, also, King v. Gudridge, 5 Barn. & C., p. 459.

In *City of London* v. *Wood*, 12 Modern, p. 669, Lord Holt said: "I agree that where the City of London claims any freedom or franchise to itself then none of London shall be judge or jury, for there they claim an interest to themselves against the rest of mankind * * * The judge is agent, the party is patient and the same person can not be both agent and patient in the same thing, but it is the same thing to say, that the same party may be patient and agent in the same thing, as to say that he may be judge and party—and it is manifest contradiction."

XII.

Nor can the right of eminent domain be excercised through this body. The compensation should be fixed by a fair, independent and impartial tribunal, and the party in interest is entitled to have the usual rights and privileges which attend judicial investigations.

Rich vs. Chicago, 59 Ill. 286;

Cooley's Const. Lim. 563;

Cunningham vs. Campbell, 33 Ga. 625;

Cox vs. Cummings, 33 Ga. 549;

Kramer vs. Cleveland, 5 Ohio St. 140;

Symonds vs. Cincinnati, 14 Ohio 174;

Kent's Com., p. 3399, Vol. 2;

Ames vs. Lake Sup. R. R., 21 Minn. 24;

Langford vs. Commissioners, 16 Minn. 375;

Powers vs. Bears, 12 Wis 214;

Van Horne's Lessee vs. Dorrance, 1 Dall (U. S. C. C.) p. 304.

In this State it has been determined that proceedings to condemn private property for public use involve the exercise of judicial power, and that such power is vested in and must be exercised by thə courts organized under the Constitution.

Spencer Creek Water Co. v. Vallejo, 48 Cal., 70.

We respectfully submit that the judgment of the State Court should be reversed; and it should be adjudged that Art. XIV of the Constitution of 1879, in so far as it conflicts with the provisions of the Act for the incorporation of water companies, approved April 22d, 1858, is void.

CHARLES N. FOX,

Att'y for Pl'ff in Error.

110-348

Supreme Court of the United States.

OCTOBER TERM, 1881.

No. 893.

SPRING VALLEY WATER WORKS

vs.

ANTONE SCHOTTLER ET AL.

Brief and Argument by Mr. EDMUNDS, of Counsel for the Plaintiff.

Thomas McGill & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

October Term, 1881.

SPRING VALLEY WATER WORKS *vs.* ANTONE SCHOTTLER ET AL.	No. 893.

BRIEF AND ARGUMENT BY MR. EDMUNDS, OF COUNSEL FOR THE PLAINTIFF.

STATEMENT.

The history of the case is set forth in the brief of Mr. Fox, and need not be stated here, except to say—

First.

That prior to the act of 1858 a general law of California subjected all corporation charters to legislative control in the usual way.

Second.

The water companies act of 1858 authorized the formation of the water companies as business corporations, "for the purpose of supplying any city or county, or any cities or towns in this State, or the inhabitants thereof, with pure fresh water." (Act 22d April, 1858, sec. 1, Mr. Fox's brief, p. 1.)

Third.

The act as amended in 1861 *required* that the reservoirs and all other works of the corporation, although they might be pure private property, and not acquired under eminent domain, should "be used exclusively for the purpose of supplying any city or county, or any cities or towns in this State, or the inhabitants thereof, with pure fresh water." (Sec. 2, Mr. Fox's brief, p. 2.)

Fourth.

The fourth section of the act bound the company to "furnish pure fresh water to the inhabitants of such city and county, or city or town, for family uses, so long as the supply permits, at reasonable rates, and without distinction of persons, upon proper demand therefor, and shall furnish water, to the extent of their means, to such city and county, or city or town, in case of fire or other great necessity, free of charge. And the rates to be charged for water shall be determined by a Board of Commissioners, to be selected as follows: Two by such city and county, or city or town, authorities, and two by the water company; and in case that four cannot agree to the valuation, then, in that case, the four shall choose a fifth person, and he shall become a member of said board; if the four commissioners cannot agree upon a fifth, then the sheriff of the county shall appoint such fifth person. The decision of a majority of said board shall determine the rates to be charged for water for one year, and until new rates shall be established. The Board of Supervisors, or the proper city or town authorities, may prescribe such *other* proper rules relating to the delivery of water, not *inconsistent with this act* and the laws and constitution of this State."

[The italics are mine. Notice also a grammatical omission in the last clause.]

Fifth.

The plaintiff incorporated on these terms, and expended fifteen to twenty millions of dollars in buying land, in preparing it for catching rain-water and storing it, and in building pipes to convey the water to the city of San Francisco, to which it thus conducted its own water, furnished it free to the city, selected the Board of Arbitration with the city provided for in section 4, and continued to furnish and sell its water at the prices fixed in the manner prescribed, until the constitution of January, 1880, undertook to upset the arrangement, and left it to the city of San Francisco alone to fix the price of the water.

Sixth.

It is not pretended that this water was public water at the place of its source, or in any other way belonging to all the people, and flowing to their houses through the pipes of the plaintiff. The Supreme Court of California itself admits this. (Rec., f. 17, p. 15.)

ARGUMENT.

The precise question is whether it was competent for the State to alter the arrangement by which the plaintiff was bound to furnish its water to the city without charge, and to furnish it to the citizens of the city at a price fixed by a board of arbitration mutually chosen by the city authorities and the plaintiff, and declare that the city government, elected by the people, should fix the price of the water consumed by themselves; and that if the company collected any other than such rates, it should forfeit all its works to the city? (See Art. XIV, Constitution of 1880, Mr. Fox's brief, p. 5.)

A.

The State having the power of alteration, &c., of corporate franchises, cannot, under cover of it, deprive a corporation of its property or its vested rights. The principles laid down by this court in the Sinking Fund cases (99 U. S., p. 719) are a complete authority for this proposition. In that case it was distinctly declared that this power of alteration did not authorize States to impair the obligation of contracts, or either the States or Congress to deprive persons or corporations of property without due process of law; "neither can they, by legislation, compel the corporation to discharge its obligation in respect to the subsidy bonds otherwise than according to the terms already made in that connection," and that "no change can be made in the title created by the grant of lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable." And the court cited with approval the opinion in the case of Shields *v.* Ohio, (95 U. S., p. 324,) that under this power "the alterations must be reasonable; they must be made in good faith and be consistent with the object and scope of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration," and said "the rules as here laid down are fully sustained by authority."

This corporation agreed to bring its property into the city of San Francisco, and to deliver it to the city for public use free, upon the consideration that it might lay its pipes, &c., in the streets, and sell its water to individuals at a price to be fixed by a board, in the selection of which it had a voice. It did so. Then the State declared that it should continue to perform the contract on its part in every respect, and deliver the water as it had done before, but should not have any voice in fixing the price of its own property, and should continue to sell it to the inhabitants of the municipality at whatever price *their agents* should choose to establish.

When the constitution of 1880 was adopted, the original contract was already executed, except in respect of its continued specific performance by the future delivery of the property and the payment of the agreed price. The plaintiff had brought its supply of water to the city, and was daily delivering it as required, and its obligation to continue the delivery was fixed, and the *obligation* of the taker to pay for it according to the contract was fixed, and the obligation of the State to allow the plaintiff to receive the agreed price was equally fixed. The price to be paid /8 was just as certain as if so much a gallon had been named in the act. *Id certum est, quod reddi certum potest.* (Broom's Legal Maxims, p. 599.)

The water was the private property of the company, and after the act of 1858 was passed, its members, as citizens, had as clear a right to bring it in vessels to the city and sell it at their own price as any citizen had to bring and sell wheat or corn. The corporation was only a means of more conveniently bringing the property to the point of consumption for sale. To this end the State gave the company the right to lay pipes, &c., and required it to agree to furnish water for city purposes free, and required it to give the people of the city one-half of the power to fix the price of the property of the company to be sold. This having been acted upon, the consideration had passed, and there vested in the company the right to participate in the fixing of the price of its own property, and the arrangement did, in effect, fix the price itself. *It was the very essence of the only valuable right of the company*, and it was a special, particular, and legal contract for the sale and delivery of property.

The act of the State in its new constitution was not a regulation of the *operation* of the works of the company—

they must go on precisely as before—but it was an edict nullifying the contract and obligation to pay the stipulated price for the property delivered, and in effect the fixing of a different price at the will of the consumer alone. The State might just as well have authorized each water-taker to fix his own price, or a convention of all the water-takers to fix a common price, as to have authorized the municipal officers, appointed by the very inhabitants of the city, to do it. Applied to this case, the act of the State had no color even of the regulation of the exercise of the franchise or any of the chartered functions of the company. The water being brought to the city and ready for delivery, there was nothing left but a mere matter of delivery and payment, and as between every person who chose to take the water and the company, the simple relation of debtor and creditor, with their mutual rights already fixed. The entire essence of the original scheme, including the "free" delivery, was the sale and delivery of the water to a particular and fixed class of customers upon fixed and established terms; and, it having been carried into effect, the claim of the State is that it may relieve one party from the obligation to pay according to the arrangement, and allow it to pay according to its own pleasure, while the other party continues to receive the full benefit of the bargain! If this does not fall within the denunciation of this court in the cases already referred to, it is not easy to say what would.

Suppose the State in the act of 1858, having its capitol and public buildings at San Francisco, had provided that the company should furnish the capitol and public buildings with water at one mill a gallon, and then, the works being completed and the water in process of delivery, should, under cover of the power to "alter," &c., declare that the company should have only one-half a mill per gallon. Would any one deny that the obligation of the contract was impaired, or insist that such an act was within the scope of the reserved legislative power ? Or suppose, in such a case, the price was to be fixed by arbitration, and then the State should undertake to fix the price for itself by an act of legislation. Could this be upheld ?

In the case in hand the *contract* of the State is that for a consideration paid by the company, the inhabitants of a particular municipality shall be bound to pay to the owner a particular price for a commodity furnished; and, the owner having no right to stop deliveries or change the stipulated compensation or the method of ascertaining the compensation, the *act* of the State is to annul the obligation of the contract and make it essentially different from what it was before, or, else, it condemns private property to public use and fixes a compensation therefor by an edict, and not by a judicial proceeding.

This is not the matter of general regulation of the *uses* of property which the owner may choose to devote to public purposes, like railroads, warehouses, licenses, &c. It is the matter of a party who has paid for the right merely to bring his own property into a corporation market by agreeing to furnish the corporation all it needs of that property free, and to allow the corporation to have an equal voice in fixing the price private members of the corporation shall pay for what they need, being compelled to allow the corporation alone to fix the price under that particular contract and for that particular purpose. If this can stand, far more easily can the State of Pennsylvania, for instance, fix the price of the coal oil of any corporation, or the price of coal or iron in the market of Philadelphia, owned by any corporation that transports it to that market. If bringing a thing to market to sell attaches to it a "public use," then, certainly, the price of every article of common necessity is at once put within the category of legislative power; food, drink, fuel, clothing, and house rent, on this theory, at once come under the control of the voting power, and the extremest doctrines of the commune are established.

But the case now under consideration is still worse, for the *owners of the water had already sold it for a stipulated price*, and were absolutely bound by the act of 1858, under which they proceeded, to supply the water to the city and its inhabitants, and they cannot make any other disposition of it. (Last clause of sec. 2 and first clause of sec 4.) Now, the State says it must receive as its pay for this water whatever sum the city chooses to allow. If this is not destroying the whole of one side of a business contract for the sale of property, it is not easy to see what is. If this is not depriving a person of his property without due process of law, no act of confiscation can be.

This case is far different from the Granger cases and the Warehouse case. The first was one of general regulation of tolls that could only be taken under the franchise in transporting other people's property. This is the case of a contract for the sale of one's own property. The second was the general regulation of the use of licensed grain warehouses, and was a provision that that particular species of business should not be carried on except upon the terms of submitting to legislative regulation, and it related entirely to the handling of the property of other persons for the public objects of transportation. To go further, and to hold that one shall sell his own private property to such people of a city as may desire to buy it at a price different from that already specially stipulated upon a valuable and executed consideration, to be fixed by the city itself, is to abandon every security of private rights that has hitherto been supposed to exist. The first case would be more like this if the charter of the C. B. & Q. Company had contained a clause that the company should bring and deliver to the State, at the capital, 100,000 bushels of wheat every year free, and should bring and sell to the inhabitants of Des Moines each year 100,000 bushels at a price to be fixed by a board of arbitration mutually appointed by the city and the company. In such a case could this court say that Iowa could *compel* the delivery of the wheat to the consumers free, or at a price to be fixed by the consumers' own agents, or even by the State? And a similar comparison can be made with the Warehouse case, too obvious to need stating at length.

Suppose in the Union Pacific R. R. case the charter had provided that the company should transport freight for the Government at a price to be fixed by a specified arbitration. Could the U. S. repeal that and lawfully declare that the price should be fixed by the Secretary of the Treasury, and compel the company to carry at that price on pain of forfeiture of all its property? Although a State may have the legal right to regulate all matters in which the general public have an interest, (and this includes nearly every act of the citizens,) this by no means includes a right to violate its own business engagements, much less to authorize municipal corporations to violate them.

The mode of fixing the price of the plaintiff's water was an essential and most important business engagement, on which the security of both parties absolutely depended. It literally comprehended all that the plaintiff was to get as a return for its first expenditure and for its own property which it was to bring to the point of delivery at an expense of millions, and which it became bound to make no other use of whatever. Can such a provision be held to be a mere legislative police regulation which may be changed at any time atthe pleasure of the State?

That the 4th section of the act of 1858 was designed to be a fundamental and concrete business contract, regulating the conduct of the only two possible parties to the transaction, appears clear from its very nature and terms as they have already been stated; and this is conclusively fortified by the last clause of the section. The section first requires the company to supply the water to the full extent of its resources at reasonable rates and without distinction of persons, and to supply it to the city in case of fire or other great necessity free of charge. It then declares how these reasonable rates shall be determined—that is, by a Board of Commissioners, in the choice of which both parties, and the only parties possibly interested in the transaction, shall have a voice. It then declares that the decision of a majority of that board shall determine the rates to be charged for the water for one year, and until new rates shall be established. So much, if language means anything, was a pure business arrangement, which fixed definitively the rights of the two parties concerning the subject in hand, viz., the sale of the property of the plaintiff to the inhabitants of the defendant, and the furnishing of a part of the same property for the general use of the corporation without charge. This is as clearly so as if these provisions had been in the form of a written contract between the plaintiff and the defendant. Then, to guard against the exclusive effect of the contract, and to distinguish between the contract rights and the power of police regulation, the last clause of the section proceeds to declare that the proper city authorities may prescribe such *other* proper rules relating to the delivery of the water *as are not inconsistent with the act* and the laws and constitution of the State. It will thus be seen that the distinction between contract business arrangements and police regulations was clearly in the mind of the law-making power, and that this distinction was carefully and separately observed. The same idea appears in section 5, where, although the corporation is given the right to lay down its pipes, &c., through the city streets, it is given that right subject to governmental regulations by the Board of Supervisors. It is manifest, therefore, that the legislation in this act intended to make clear, and did make clear, what were essentially the private business arrangements of the parties, and what was the public power of regulation as distinguished therefrom. The first, as was decided by this court in the Sinking Fund cases, could not be departed from without the consent of the company; the second rested in the political discretion of the sovereign power.

B.

But the State *itself* has not undertaken to fix the price of the plaintiff's water. It has declared that a municipal corporation, which, with its inhabitants, is the only possible customer of the plaintiff, shall itself determine the compensation to be made for the property that the plaintiff is forced to furnish and sell to the corporation and its members, and to them alone. The water itself was confessedly private property, as much so as milk or molasses. There could be no pretense of right to meddle with the ownership of it, save for the public use. If it was to be taken for public use—and, as we have seen, it is a case of *compulsion*, the company *must* deliver it—there must be provided just compensation to the owner. To take it otherwise would be "without due process of law," and against the "equal protection of the laws." But it is not due process of law to compel a citizen to give up his property for the use of a municipal corporation or its inhabitants, and leave *them only* to judge what *is* just compensation. When the owner, as in this case, is compelled to part with his property whether he will or not, the question of just compensation is a judicial one, and it cannot be left to the decision of the party to be directly benefited by it. This is as clear upon all authority as it is upon the fundamental principles of just government.

See Cooley's Constitutional Limitations, p. *563.

The case, then, is one where there is no liberty of choice by the plaintiff whether it will part with its property or not. In engaging to part with it, it did so under the security that the compensation should be fixed by a tribunal specially agreed upon, in the constitution of which it should have a voice. It has complied with its engagement, and it cannot now be turned over for the measure of its compensation either to the caprice or judgment of the party directly interested in the question, even if it were possible for the *State* to require the question of just compensation in this case to be submitted to a regular court of justice, which is denied.

It is submitted, then, that the new constitution of the State could not in this way deprive the plaintiff of the right to have the price of its water fixed according to the provisions of section 4 of the act of 1858. This being so, it follows that the board provided for in that section must be kept up, and that it was the duty of the defendants to have filled the vacancy existing in the board on the application of the plaintiff. Refusing to do so, a writ of mandate was the proper proceeding to compel the performance of the duty.

GEORGE F. EDMUNDS,
Of Counsel for the Plaintiff.

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JAMES H. McKENNEY

Supreme Court of the United States.

THE SPRING VALLEY WATER WORKS,
Plaintiff in Error,
vs.
ANTONE SCHOTTLER, *et al.*,
Defendants in Error.

No. 893.

Brief for Plaintiff in Error.

RICHARD CROWLEY,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

THE SPRING VALLEY WATER WORKS,
Plaintiff in Error,
vs.
ANTONE SCHOTTLER, *et al.*,
Defendants in Error.
No. 893.

Brief for Plaintiff in Error.

The facts of this case are so fully set forth in the brief of Mr. Fox, and in the record, that a statement of them is unnecessary, further than to state that

The people of the State of California, in 1849, adopted a constitution which contained the following provision:

> "ARTICLE FOUR.
>
> "SEC. 32. Corporations may be formed under general laws, but shall not be created by special act, "except for municipal purposes. All general laws "and special acts passed pursuant to this Section may "be altered from time to time or repealed."

This provision continued in force until the adoption of the Constitution of 1880, hereinafter mentioned.

In 1858 the Legislature of California passed an Act of which the following is a copy:

"AN ACT FOR THE INCORPORATION OF WATER COMPANIES.

(Approved April 22, 1858.)

"SECTION 1. The provisions of an Act entitled an " Act to provide for the formation of corporations for " certain purposes, passed April fourteenth, one thou- " sand eight hundred and fifty-three, and the provis- " ions of an Act entitled an Act to amend an Act " entitled an Act to provide for the formation of " corporations for certain purposes, passed April four- " teenth, one thousand eight hundred and fifty-three, " and passed on the thirtieth (30th) day of April, one " thousand eight hundred and fifty-five, shall extend " to and apply to all corporations already formed or " hereafter to be formed, under said acts, for the pur- " pose of supplying any city and county, or any cities " and towns in this State, or the inhabitants thereof, " with pure, fresh water.

"SEC. 2. Any company, incorporated for the pur- " poses specified in the preceding Section, shall have " the right to purchase, or to appropriate and take " possession of, and use and hold all such lands and " waters as may be required for the purposes of the " company, upon making compensation therefor. The " mode of proceeding to appropriate and take possession " of such lands and waters, when the parties can not " agree upon a purchase thereof, shall be the same as " prescribed in Sections Twenty-seven, Twenty-eight " and Twenty-nine of an Act to provide for the incor- " porating of railroad companies, passed April twenty- " second, one thousand eight hundred and fifty-three, " except that such proceedings shall be had before the " County Judge of the county in which such lands or " waters, or both, may be situated;

"*Provided*, that all reservoirs, canals, ditches, pipes, " aqueducts, and all conduits heretofore built, or that " hereafter may be constructed, by any corporation "formed under this Act, or claiming the privileges, "rights and immunities herein granted, or any of them, "shall be used exclusively for the purpose of supplying "any city and county, or any cities or towns, in this "State, or the inhabitants thereof, with pure, fresh "water.

"SEC. 3. All privileges, immunities and franchises "that may hereafter be granted to any individual or "individuals, or to any corporation or corporations, "relating to the introduction of fresh water into the "city and county of San Francisco, or into any city or "town in this State, for the use of the inhabitants "thereof, are hereby granted to all companies incorpor-"ated, or that may hereafter become incorporated, for "the purposes aforesaid.

"SEC. 4. All corporations formed under the provis-"ions of this Act, or claiming any of the privileges of "the same, shall furnish pure, fresh water to the in-"habitants of such city and county, or city or town, for "family uses, so long as the supply permits, at reason-"able rates, and without distinction of persons, upon "proper demand therefor, and shall furnish water, to "the extent of their means, to such city and county, "or city or town, in case of fire or other great necessity, "free of charge. And the rates to be charged for "water shall be determined by a board of commis-"sioners, to be selected as follows: Two by such city "and county, or city or town authorities, and two by "the water company; and in case that four cannot "agree to the valuation, then, in that case, the four "shall choose a fifth person, and he shall become a "member of said board; if the four commissioners "can not agree upon a fifth, then the Sheriff of the "county shall appoint such fifth person. The decision "of a majority of said board shall determine the "rates to be charged for water for one year, and until "new rates shall be established. The Board of Super-

"visors, or the proper city or town authorities, may "prescribe such other proper rules relating to the de- "livery of water, not inconsistent with this Act and the "laws and constitution of this State.

"SEC. 5. Any corporation created under the pro- "visions of this Act shall have the right, subject to the "reasonable direction of the the Board of Supervisors, "or city or town authorities, as to the mode and "manner of exercising such right, to use so much of "the streets, way and alleys in any town, city, or city "and county, or any public road therein, as may be "necessary for laying pipes for conducting water into "any such town, city, or city and county, or through "or into any part or parts thereof.

"SEC. 6. Any corporation heretofore formed for the "purposes specified in this Act shall have the right to "re-incorporate under the provisions of this Act, with- "out losing, forfeiting or diminishing any of the "rights, privileges, franchises or immunities which "they have heretofore lawfully acquired."

June 19th, 1858, the plaintiff in error was incorporated under the above Act, and the other general Acts of the State, applicable thereto, under articles of incorporation which declared that

"The object for which said company is formed, is "the introduction of pure, fresh water, into the city "and county of San Francisco, and into any part "thereof, from any point or points, place or places, "for the purpose of supplying the inhabitants of said "city and county with the same, and to do and trans- "act all such business relating thereto, as may be nec- "essary and proper, not, however, to be inconsistent "with the laws and constitution of the State of Cali- "fornia."

These articles of incorporation were held valid by the Supreme Court of the State in

> *Matter of S. V. W. W.*, 17 *Cal.*, 132.
> *S. V. W. W. vs. San Francisco, et al.*, 22 *Cal.*, 434.

The Supreme Court of the State also held that the Company was incorporated under, subject to, and dependent for its rights and privileges, upon said Act of April 22d, 1858, and the Acts therein mentioned.

> *City and County of San Francisco vs. S. V. W. W.*, 48 *Cal.*, 493.

The Act of 1858, as amended in 1861, as will be seen, *required*

"That all canals, reservoirs, ditches, pipes, aqueducts, "and all conduits heretofore built, or that hereafter "may be constructed by any corporation formed "under this Act or claiming the privileges, rights or "immunities, herein granted, or any of them, *shall be "used exclusively for the purpose of supplying any city or "county, or any cities or towns in this State, or the in-"habitants thereof, with pure, fresh water.*" And this without reference as to whether they might be private property or acquired by right of eminent domain.

Under the constitution and the Acts aforesaid, and upon these terms and conditions, the company was organized and commenced business, and has expended about twenty millions of dollars in buying lands and constructing canals, reservoirs, ditches, pipes, acqueducts and conduits to hold and convey to the city and county of San Francisco, and the inhabitants thereof, water from its works and through its own pipes, etc., and has furnshed it to the city for municipal purposes, free of charge.

In January, 1878, a Board of Commissioners was appointed as provided by Sec. 4 of the Act of 1858, as, and for the purposes therein mentioned, and which Board fixed the tariff of rates to be charged, as therein provided.

This condition of things continued until under the new constitution of 1880 it was sought to overthrow this arrangement and leave it to the Board of Supervisors of the city and county of San Francisco, alone, to fix the price of water.

See Mr. Fox's brief, pages 5 and 6.
Also opinion of the Court Below, Record, P. 13.

The provisions of the constitution of 1880, under which this right is claimed, are as follows:

"ARTICLE XIV.

"*Water and Water Rights.*

"SECTION 1. The use of all water now appropriated, "or that may hereafter be appropriated, for sale, rental, "or distribution, is hereby declared to be a public use, "and subject to the regulation and control of the State, "in the manner to be prescribed by law; *provided*, that "the rates or compensation to be collected by any per-"son, company, or corporation in this State for the use "of water supplied to any city and county, or city or "town, or the inhabitants thereof, shall be fixed, annu-"ally, by the Board of Supervisors, or city and county, "or city or town council, or other governing body of "such city and county, or city or town, by ordinance or "otherwise, in the manner that other ordinances or "legislative acts or resolutions are passed by such body, "and shall continue in force for one year and no longer. "Such ordinances or resolutions shall be passed in "the month of February of each year, and take effect on "the first day of July thereafter. Any board or body "failing to pass the necessary ordinances or resolutions "fixing water-rates, where necessary, within such time, "shall be subject to peremptory process to compel action "at the suit of any party interested, and shall be liable "to such further processes and penalties as the Legis-"lature may prescribe. Any person, company, or cor-"poration collecting water-rates in any city and county, "or city or town in this State, otherwise than as so estab-"lished, shall forfeit the franchises and water-works of "such person, company, or corporation to the city and "county, or city or town where the same are collected, "for the public use.

"SEC. 2. The right to collect rates or compensation "for the use of water supplied to any county, city and "county, or town, or the inhabitants thereof, is a fran-"chise, and can not be exercised except by authority of "and in the manner prescribed by law."

The constitution of California of 1880, and the legislation based thereon, assuming to vest in the Board of Supervisors of the city and county of San Francisco, alone, the right and power to fix the rates of compensation for this company's water or for the use of its water, used by said city and county and its inhabitants and denouncing a forfeiture of its franchises and water-works, to the city and county, for public use, for failure to comply therewith, is in conflict with the Constitution of the United States.

I.

The company had purchased lands outside of the city and county of San Francisco, and created thereon artificial lakes to hold and store the waters that fall in winter upon its own soil, had constructed aqueducts fifty miles in length to carry its waters thus gathered and held, to the market proposed in its articles of incorporation, for sale; had purchased lands in the city and county of San Francisco for the erection, and had erected thereon distributing reservoirs and had laid down two hundred miles of iron mains in the streets of the city, and had erected other works necessary in the transaction of its business.

The water thus collected and brought to the city through its own mains and water works was, therefore, the private property of the company.

This seems unquestioned. Water thus acquired has been held by the Supreme Court of California to be private property.

> " Water when collected in reservoirs or pipes and
> " thus separated from the original source or supply, is
> " personal property, and is as much the subject of sale—
> " an article of commerce—as ordinary goods and
> " merchandise."

Heyneman vs. Blake, 19 *Cal.*, 594.

The Constitution of 1880 giving the Board of Supervisors of San Francisco, alone, the absolute and arbitrary power to fix the charges at which the city may use the company's private property, and declaring forfeit the franchises and water works of the Company to the city for public use, if the company fails or refuses to comply with such charges, so fixed, contravenes the Fifth and Fourteenth Amendments to the Constitution of the United States, which provide that

> " No person shall * * * be deprived of * * *
> " property without due process of law; nor shall
> " private property be taken for public use without just
> " compensation."

The Constitution of 1880 and the attempted action thereunder to deprive this company of its water, upon such terms as the Board of Supervisors, alone, might fix, is not " due process of law," and the absolute forfeiture of its franchises and water works, to the city, for public use, in case of violation of the rates so established, is, without any compensation to the company, "just" or otherwise.

The doctrine is an alarming one, that a State may, for itself, or for any of its municipalities, or for the inhabitants thereof, through constitutional or legislative action, take the private property of its citizens, for public use, at its own price, or at a price fixed alone by such municipality, it being itself the only consumer, and absolutely forfeit it, if the citizen is unable or unwilling to comply with such price thus arbitrarily fixed. The Constitution of 1880 was unusual and arbitrary in its character and provisions. It was not judicial, and gave no trial or hearing before forfeiture, or judgment before dispossession.

The Constitution of the United States has wisely thrown safe guards around the citizen and his property against such action on the part of any State.

II.

The constitution of 1880 is in violation of the Constitution of the United States which prohibits any State from passing any law impairing the obligation of contracts.

Con. of U. S., Art. 1, *Sec.* 10.

The incorporation of the company under the Act of 1858 was a contract between the State and the company.

That Act on the part of the State gave the company the right to take and hold lands and waters needed for its purposes, and if necessary to excercise the right of eminent domain in acquiring them, upon the condition "that all reservoirs, canals, ditches, pipes, aqueducts "and all conduits heretofore built, or that hereafter "may be constructed, by any corporation formed under "this Act, or claiming the privileges, rights and im-

"munities herein granted, or any of them, shall be "used exclusively for the purpose of supplying any "city and county, or any cities or towns, in this State, or "the inhabitants thereof, with pure, fresh water."

The State also gave the company the right to use the streets and roads of the city and county in laying pipes for conducting water into the city and county.

The company on its part contracted to furnish pure, fresh water to the inhabitants of the city and county at reasonable rates to be determined by a Board of four Commissioners equally selected by the city and company, with provision for a fifth commissioner if necessary; and to furnish water to the city for municipal purposes, free of charge.

Under that contract water-rates were established and the company has furnished water to the city for municipal purposes free of charge, and to the inhabitants thereof at such rates.

The contract thereby became executed and rights under it vested.

Sections 1 and 2 of the constitution of 1880, impair the obligations of this contract.

It was an act of incorporation granted on a valuable consideration, and vested rights under it were not subject to the State's Legislative power.

It contained all the essential parts of a contract. There was subject matter to be contracted about, parties, and mutual considerations and inducements.

"It is now too late to contend that any contract which "a State actually enters into when granting a charter "to a private corporation is not within the protection of "the clause in the Constitution of the United States that "prohibits States from passing laws impairing the obli-"gation of contracts. Art. 1, Sec. 10. The doctrines of "trustees of Dartmouth College, v. Woodward (4 Wheat., "518), announced by this Court more than sixty years "ago, have become so imbedded in the jurisprudence of "the United States as to make them to all intents and

"purposes a part of the constitution itself. In this con-
"nection, however, it is to be kept in mind that it is not
"the charter which is protected, but only any contract
"the charter may contain. If there is no contract, there
"is nothing in the grant on which the constitution can
"act. Consequently the first inquiry in this class of
"cases always is, whether a contract has in fact been
"entered into, and if so, what its obligations are."

Stone vs. Mississippi, 101, *U. S.*, 814.

Conceding the right of the State under the Constitution of 1849 to alter or repeal corporate franchises, yet it cannot under such power of alteration, destroy vested rights or deprive the company of its property.

In passing upon this question of alteration, this Court has well said

"The power of alteration and amendment is not
"without limit. The alterations must be reasonable;
"they must be made in good faith, and be consistent
"with the scope and object of the Act of incorporation.
"Sheer oppression and wrong cannot be inflicted
"under the guise of amendment or alteration. Beyond
"the sphere of the reserved powers, the vested rights
"of property of corporations, in such cases, are sur-
"rounded by the same sanctions and are as inviolable
"as in other cases."

Shields vs. Ohio, 95 *U. S.*, 319–324, 325 *and cases therein cited.*

This doctrine was again reiterated by this Court in the "sinking fund" cases.

"The United States cannot any more than a State
interfere with private rights, except for legitimate
"governmental purposes. They are not included
"within the constitutional prohibition which prevents

" States from passing laws impairing the obligation of " contracts, but equally with the States they are prohibited from depriving persons or corporations of " property without due process of law. They can " not legislate back to themselves, without making " compensation, the lands they have given this corporation to aid in the construction of its railroad. " Neither can they by legislation compel the corporation to discharge its obligations in respect to the " subsidy bonds otherwise than according to the terms " of the contract already made in that connection. " The United States are as much bound by their contracts as are individuals. If they repudiate their " obligations, it is as much repudiation, with all the " wrong and reproach that term implies, as it would " be if the repudiator had been a State or a municipality or a citizen. No change can be made in the " title created by the grant of the lands, or in the " contract for the subsidy bonds, without the consent " of the corporation. All this is indisputable.

* * * * * * *

" That this power has a limit no one can doubt. All " agree that it cannot be used to take away property " already acquired under the operation of the charter, " or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made.

* * * * * * *

" The rules as here laid down are fully sustained by " authority."

Sinking Fund cases, 99 *U. S.*, 718.
Miller vs. The State, 15 *Wall.*, 478–498.

The Constitution of 1880 sought to import new stipulations and powers into the contract.

It took away without the assent of the company its voice and power, vested in it by the Act of 1858, to fix the price of its water, and vested that power wholly in other persons.

This the State could not do.

Miller vs. The State, 15 *Wall.*, 478.
Zabriskie vs. H. & N. Y. R. R. Co., 3, *C. E. Green*, 192.
Allen vs. McKean, 1 *Sum.*, 277.

It was the creation of a different and not impartial tribunal to fix the price of the company's water.

"What the tribunal shall be which is to assess the "compensation must be determined either by the constitution or by the statute which provides for the "appropriation. The case is not one where, as a matter "of right, the party is entitled to a trial by jury, unless "the constitution has provided that tribunal for the "purpose. Nevertheless, the proceeding is judicial in "its character, and the party in interest is entitled to "have an impartial tribunal, and the usual rights and "privileges which attend judicial investigations. It is "not competent for the State itself to fix the compensation through the legislature, for this would make it "the judge in its own cause."

Cooley's Constitutional Limitations, *563.

The Court below seems to have relied, largely, upon the decision of this Court in Munn vs. Illinois, 94 U. S., 126.

Neither that case nor the so called "Granger Cases."

Chicago, etc., R. R. Co. vs. Iowa, 94 *U. S.*, 155.
Peik vs. Chicago, etc., Railway Co., *Id.*, 164.
Chicago, etc., R. R. Co. vs. Ackley, *Id.*, 179.
Winona & St. Peter R. R. Co., vs. Blake, *Id.*, 180.
Stone vs. Wisconson, *Id.*, 181,

determine this case.

The legislation passed upon and the facts in these cases are familiar to the Court.

All these cases relate only to the regulation by the state of the *use* of property in which the public has an interest, and this Court held in these cases that the State might fix the price for storing grain in public warehouses, and for carrying passengers and freight on railroads.

It did not decide that the State might, alone, or through municipalities or the agents of municipalities, fix the price at which a citizen must sell his warehouse or railroad, or property, to the State or its municipalities or the inhabitants thereof.

In the case of Munn vs. Illinois, the Court held, "that property does become clothed with a public in-"terest when used in a manner to make it of public "consequence, and affect the community at large. "When, therefore, one devotes his property to a use "in which the public has an interest, he, in effect, "grants to the public an interest in that use, and must "submit to be controlled by the public for the common "good, to the extent of the interest he has thus created. "He may withdraw his grant by discontinuing the use; "but, so long as he maintains the use, he must submit "to the control."

The Act of the Legislature of Illinois, before the Court went only to the regulation of public warehouses, and the warehousing and inspection of grain, and fixing the maximum charge for storing and handling the same.

The State fixed such maximum price between the warehouseman and person doing business with him for such warehousing and handling, not the price of the grain, and did not seek to confer the power of fixing such price wholly upon the customer, nor to forfeit the warehouse and its contents to such customer for public use, for failure to comply with its provisions.

The Company in this case by reason of its contract could not do what the Court said the warehouseman might do, namely, "withdraw his grant by discontinu-"ing the use."

The company was debarred from that by the latter part of Sec. 2 of the Act of 1858 which provided, that "its water works and property shall be used *exclusively* "for the purpose of supplying the city and county of "San Francisco with pure, fresh water," and by the first part of Sec. 1 of Art. 14 of the Con. of 1880 which declares that

"The use of all water now appropriated, or that may "hereafter be appropriated, for sale, rental or distri-"bution is hereby declared to be a public use, and "subject to the regulation and control of the State, in "the manner to be prescribed by law," and denounced a forfeiture of its franchises and water works if it did not submit to such regulation and control.

The first of the "Granger cases," Chicago, Burlington and Quincy Railroad vs. Iowa, the doctrine in which was followed in the other cases, was that an Act of the Legislature of Iowa establishing maximum rates of charges for the transportation of freight and passengers on the different railroads of the State, was not in conflict with the Constitution of Iowa nor a regulation of Inter-State Commerce.

The only question in that case, and in all these cases, was as to regulation of the *use* of railroads in carrying passengers and freight.

The contract of this Company with the city and county of San Francisco, was for the *sale* of its property, its water, and not a regulation of the *use* of its water.

The action of the State in the constitution of 1880 was not a regulation of the *use* of the water or of the works of the company. It was an absolute fixing of the price of its *sale* of water at the will of the consumer alone.

III.

It can not be maintained that the State had the right to enact the new Constitution in question, under the police power of the State.

"Many attempts have been made in this Court and "elsewhere to define the police power, but never with "entire success. It is always easier to determine "whether a particular case comes within the general "scope of the power, than to give an abstract definition "of the power itself which will be in all respects "accurate."

Stone vs. Mississippi, 101 *U. S.*, 814–818.

Clearly the legislation in question is not within the power of police regulation.

"The limit of the exercise of the Police power in "these cases must be this: The regulations must have "reference to the comfort, safety, or welfare of society; "they must not be in conflict with any of the provisions "of the charter; and they must not under pretence "of regulation, take from the corporation any of the "essential rights and privileges which the charter confers. "In short, they must be police regulations in "fact, and not amendments of the charter in curtailment "of the corporate franchise."

Cooley's Constitutional Limitations, p. *577.

RICHARD CROWLEY,

Of Counsel for Plaintiff in Error.

110-348

San Francisco Water Rate Case.

No. 288.

SPRING VALLEY WATER WORKS, Plaintiff in Error,

vs.

ANTOINE SCHOTTLER et al., Defendants in Error.

ORAL ARGUMENT ON BEHALF OF PLAINTIFF,

— BY —

CHARLES N. FOX,
FRANCIS G. NEWLANDS,
GEORGE F. EDMUNDS.

Thomas McGill & Co., Law Printers, Washington, D. C.

STATEMENT.

The Spring Valley Water Works, plaintiff in error, was incorporated in 1858 pursuant to the provisions of an act for the incorporation of water companies, approved April 22, 1858, for the purpose of supplying San Francisco with water. Prior to the adoption by the State of California of the constitution of 1879, it had completed the works and expended many millions of dollars thereon. The plaintiff in error contends that article XIV of the constitution of 1879 impairs the obligation of the contract contained in the act of 1858, deprives it of its property without due process of law, and denies it the equal protection of the laws, contrary to the Federal Constitution and its amendments. The act of 1858 and article XIV of the new constitution are:

AN ACT for the incorporation of water companies.

[Approved April 22, 1858.]

SECTION. 1. The provisions of an act entitled "An act to provide for the formation of corporations for certain purposes," passed April fourteenth, one thousand eight hundred and fifty-three, and the provisions of an act entitled "An act to amend an act to provide for the formation of corporations for certain purposes, passed April fourteenth, one thousand eight hundred and fifty-three," and passed on the thirtieth (30th) day of April, one thousand eight hundred and fifty-five, shall extend to and apply to all corporations already formed, or hereafter to be formed, under said acts, for the purpose of supplying any city and county, or any cities or towns in this State, or the inhabitants thereof, with pure, fresh water.

SEC. 2. Any company, incorporated for the purposes specified in the preceding section, shall have the right to purchase, or to appropriate and take possession of, and use and hold all such lands and waters as may be required for the purposes of the company, upon making compensation therefor. The mode of proceeding to appropriate and take possession of such lands and waters, when the parties cannot agree upon a purchase thereof, shall be the same as prescribed in sections twenty-seven, twenty-eight, and twenty-nine of an act to provide for the incorporating of railroad companies, passed April twenty-second, one thousand eight hundred and fifty-three, except that such proceedings shall be had before the county judge of the county in which such lands or waters or both may be situated; *provided*, that all resevoirs, canals, ditches, pipes, aqueducts, and all conduits heretofore built, or that hereafter may be constructed, by any corporation formed under this act, or claiming the privileges, rights, and immunities herein granted, or any of them, shall be used exclusively for the purpose of supplying any city and county, or any cities or towns, in this State, or the inhabitants thereof, with pure, fresh water.

SEC. 3. All privileges, immunities, and franchises that may hereafter be granted to any individual or individuals, or to any corporation or corporations, relating to the introduction of fresh water into the city and county of San Francisco, or into any city or town in this State, for the use of the inhabitants thereof, are hereby granted to all companies incorporated, or that may hereafter become incorporated, for the purposes aforesaid.

SEC. 4. All corporations formed under the provisions of this act, or claiming any of the privileges of the same, shall furnish pure, fresh water to the inhabitants of such city and county, or city or town, for family uses, so long as the supply permits, at reasonable rates, and without distinction of persons, upon proper demand therefor, and shall furnish water, to the extent of their means, to such city and county, or city or town, in case of fire or other great necessity, free of charge. And the rates to be charged for water shall be determined by a board of commissioners, to be selected as follows: Two by such city and county, or city or town authorities, and two by the water company; and in case that four cannot agree to the valuation, then, in that case, the four shall choose a fifth person, and he shall become a member of said board; if the four commissioners cannot agree upon a fifth, then the sheriff of the county shall appoint such fifth person. The decision of a majority of said board shall determine the rates to be charged for water for one year, and until new rates shall be established. The board of supervisors, or the proper city or town authorities, may prescribe such other proper rules relating to the delivery of water, not inconsistent with this act and the laws and constitution of this State.

SEC. 5. Any corporation created under the provisions of this act shall have the right, subject to the reasonable direction of the board of supervisors, or city or town authorities, as to the mode and manner of exercising such right, to use so much of the streets, ways, and alleys in any town, city, or city and county, or any public road therein, as may be necessary for laying pipes for conducting water into any such town, city, or city and county, or through or into any part or parts thereof.

SEC. 6 Any corporation heretofore formed for the purposes specified in this act shall have the right to reincorporate under the provisions of this act, without losing, forfeiting or diminishing any of the rights, privileges, franchises, or immunities which they have heretofore lawfully acquired.

CONSTITUTION OF CALIFORNIA.

[Adopted, 1879.]

ARTICLE XIV.—WATER AND WATER RIGHTS.

SECTION 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law: *Provided*, That the rates or compensation to be collected by any person, company, or corporation in this State for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month o purposes. The prayer of the plaintiff was denied in the court below, the case being heard upon demurrer to the petition, and a writ of error has been sued out bringing the case here.

The questions involved are, first, whether or not article XIV of the present constitution of California conflicts with that provision of the Constitution of the United States which declares that no State shall pass any law "impairing the obligation of contracts"; and, second, whether or not it conflicts with the fourteenth amendment of the Constitution of the United States, which provides: "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The plaintiff in this case claims that these provisions of the constitution of California are in conflict with all these provisions of the Federal Constitution, and that they also conflict with that fundamental principle which lies at the basis of the administration of justice in all courts, to wit, that no man shall be a judge in his own case.

A brief history of the legislation of California, and of the action had under it, so far as it bears upon this controversy, will better enable those not familiar with that legislation to understand the points which are made by the plaintiff in this case.

As early as 1850, at the first session of the Legislature of that State a general law was passed providing for the formation of corporations, which provided for the formation, (that is, the manner of forming,) and the powers and manner of exercising the powers, of corporations for nearly every purpose for which men may contract. No mention was made in the act with reference to supplying water to cities or towns, or any other specific purpose. It applied to business corporations generally.

In 1852 an act was passed entitled "An act to provide for the incorporation of water companies," and it is but fair to the court to call attention to that act, although the act under which this plaintiff was incorporated was a later one. Notwithstanding the form of the title of that act, which I have correctly recited, and which is also the form of the title of the act under which the plaintiff was incorporated, the act did not provide any mode of incorporation whatever, nor did it prescribe the manner of exercising corporate powers. It consisted of three sections only, the first of which provided that "the provisions of chapters one and five" of the act of 1850 should apply to all corporations formed "for the purpose of supplying any cities or towns in this State, or the inhabitants thereof, with pure, fresh water;" and that is all there is in the act about the mode and manner of forming the corporations or conducting their business; it remands them to the act of 1850.

Section 2 of the act gave to any corporation formed for this purpose a right to acquire property when it was necessary for its corporate use, and could not be acquired by purchase or gift, by the exercise of the power of eminent domain.

Section 3, the only remaining section, provided:

> "This act shall not give to any company a right to supply any city with water unless it shall be previously authorized by an ordinance, or unless it be done in conformity with a contract entered into between the city and the company. Any contracts hereafter so made shall be valid and binding in law, but shall not take from the city the right to regulate the rates for water; nor shall any exclusive right be granted by contract or otherwise for a term exceeding twenty years."

This act, with the act of 1850, constituted the only law under which companies could be organized for the purpose of supplying cities and towns with water until the year 1858. Perhaps I am a little too fast in saying that. It constituted at this time, at any rate, the only law under which they could incorporate and engage in that business, and your Honors will observe that even when incorporated for that purpose they were not authorized to supply cities and towns except by municipal ordinance or contract, and the act was passed upon the assumption that the city would have the right to fix the rates for water so furnished, and provides that no contract shall be made which shall take away that right. No company ever organized to engage in this business under this law.

At the next session of the Legislature, in 1853, another general incorporation law was passed, which is found in the statutes of 1853, at page 87, and which is copied in full, as well as the act of 1852, in the pamphlet which I have here, that we prepared for our convenience some years since. Another act was then passed to provide for the formation of corporations for certain purposes. The first section of that act provided that—

> "Corporations for manufacturing, mining, mechanical, mercantile, wharfing and docking, or commercial purposes, or for the purpose of engaging in any other species of trade, business, or commerce, foreign or domestic, may be formed according to the provisions of this act; such corporations and the members thereof being subject to all the conditions and liabilities herein imposed, and none others."

And the concluding section repealed chapter 5 of the act of 1850, which was the chapter providing the manner of conducting corporate business, &c.

In 1857 a corporation called the San Francisco City Water Works was organized for the purpose of utilizing a small source of supply within the territory of San Francisco. This corporation did not organize under the act of 1850, which was made the organizing act under the act of 1852, but organized under the act of 1853 by express terms. Your Honors will find a copy of the articles of this incorporation on page 10 of the pamphlet. They organized under this act of 1853 as a business trading corporation. They organized on the 15th of June, 1857, and on the 6th of August, 1857, the company entered into a contract with the city and county of San Francisco, which took the form of an ordinance or order, as it is entitled there, called Order No. 46, and that order was afterwards ratified by an act of the Legislature. This order authorized the company to appropriate that source of supply of which I have spoken, to construct water works for the distribution of it to the inhabitants of the city and county of San Francisco, and provided two things to which I desire to call your Honors' attention, as it was part of the legislation of the State, afterwards being ratified. It was amended by Order No. 172, which was also ratified, and the order as amended is published in this pamphlet, commencing at page 12.

In accordance with the statute as it then stood, declaring that no contract should be made which should take away from the city the right to regulate the rates for water, in this order by which these rights were granted, and this contract, made with the San Francisco City Water Works, it was provided that the city should regulate the rates to be collected for the water; that for that purpose the San Francisco Water Works should report to the municipal authorities the cost of their works, and rates should be so fixed and regulated as—

> "For the first four years ensuing said date shall be calculated to produce a gross revenue of twenty-four per centum per annum upon the actual cash capital invested, and thereafter for the term of fifteen years such rates shall be established as will produce a gross revenue of twenty per centum per annum on the cash capital invested, and after the expiration of said last mentioned term the rates shall be reduced one per centum per annum until such reduction shall leave to the company eight per centum per annum net revenue upon the actual cash capital invested, unless the said city and county shall have sooner reimbursed to said company the cost of said works, as provided in sections six and seven."

Section 8 of this order also provided:

> "It is hereby provided that should any other company, person or persons, receive permission to introduce water for the purpose of supplying the said city and county therewith, no more favorable terms shall be granted to such company or persons than to the company authorized under this order, without extending the same terms to the San Francisco Water Works."

That was ratified by an amendment in 1858, (Statutes of 1858, page 77.) Under this contract so made the San Francisco City Water Works commenced operations toward utilizing the supply of water named in the contract, and no money was expended further than to merely organize prior to the passage of the act of 1858, to which I now call your Honors' attention, and under which this plaintiff is organized. That act was approved April 22, 1858, entitled "An act for the incorporation of water companies," and, like the former one, provided no mode of incorporation; nor did it provide the method of exercising any of the corporate powers, but simply extended certain rights to corporations formed under the act of 1853. The first section provides that corporations formed under the act of 1853 for the purpose of supplying cities and towns with water shall have the privileges and be subject to the obligations prescribed in this act, and section 2 of the act provided that parties should have the right to acquire property by the exercise of the power of eminent domain; but it further provided—and to this I call your Honors' especial attention, because it is to our minds a matter of great importance in considering the questions which we present; you will find that at the conclusion of section 2, page 18, of this pamphlet—that

> "All canals, reservoirs, ditches, pipes, aqueducts, and all conduits heretofore built, or that hereafter may be constructed, by any corporation formed under this act, or claiming the privileges, rights or immunities herein granted, or any of them, shall be used exclusively for the purpose

of supplying any city or county, or any cities or towns in this State, or the inhabitants thereof, with pure, fresh water."

Your Honors will apprehend the point, I think, at once. Under that provision a corporation accepting the provisions of this act and entering upon the business therein prescribed cannot, as your Honors intimated in Munn *v.* Illinois, withdraw the use and thereby prevent the city from exercising the control. They are compelled, if they accept this act, to use the property acquired for that one purpose exclusively, for the supply of cities and towns with water.

Section 4 of the act I will also read:

> "All corporations formed under the provisions of this act, or claiming any of the privileges of the same, shall furnish pure, fresh water to the inhabitants of such city and county, or city or town, for family uses, so long as the supply permits, at reasonable rates and without distinction of persons, upon proper demand therefor, and shall furnish water to the extent of their means to such city and county, or city or town, in case of fire or other great necessity, free of charge. And the rates to be charged for water shall be determined by a board of commissioners, to be selected as follows: Two by such city and county, or city or town, authorities, and two by the water company, and in case that four cannot agree to the valuation, then, in that case, the four shall choose a fifth person, and he shall become a member of said board; if the four commissioners cannot agree upon a fifth, then the sheriff of the county shall appoint such fifth person. The decision of a majority of said board shall determine the rates to be charged for water for one year, and until new rates shall be established. The board of supervisors, or the proper city or town authorities, may prescribe such other proper rules relating to the delivery of water not inconsistent with this act and the laws and constitution of this State."

It is under this act and the act of 1853, to which it refers for purposes of organization and general powers, that this plaintiff is organized. As I said before, no corporation was formed under the acts of 1850 and 1852, which constituted one law for that purpose. Under the act of 1853, a small corporation for the purpose of utilizing a limited supply was formed, but the purpose was not carried into execution. A contract was made with it when this law was passed, and it and the municipal authorities of San Francisco both took advantage of the provisions prescribed in that contract, which it had made, to immediately remit that corporation to all the benefits and privileges granted by this act. I say immediately; it was 1863 before the act of the Legislature was passed which your Honors will find at page 24 of the pamphlet, and which reads :

> "In accordance with the recommendation of the board of supervisors of the city and county of San Francisco, expressed in resolution No. 2324, passed January 5, 1863, and approved January 6, 1863, in relation to the San Francisco City Water Works, the said company are hereby relieved and discharged from any and all obligations whereby it has agreed to pay the said city and county of San Francisco five per cent. of its gross earnings."

That was one of the provisions of the original contract.

> "Sec. 2. It is hereby provided that should any other company, person or persons, excepting the city and county of San Francisco, receive permission to introduce water for the purpose of supplying the city and county therewith, no more favorable terms shall be granted to such company, person or persons, than are now enjoyed by the San Francisco City Water Works, without extending the same to the latter company."
>
> "Sec. 3. It is hereby provided that any rights, privileges, or immunities now enjoyed by the Spring Valley Water Works, [this plaintiff] by virtue of an act entitled 'An act to authorize George H. Ensign and others (owners of the Spring Valley Water Works) to lay down water pipes in the public streets of the city and county of San Francisco,' approved April 23, 1858, which are more

favorable than the terms heretofore granted to the San Francisco City Water Works, shall be held and enjoyed by the said company."

The act to which this reference is made, the act to grant to Mr. Ensign and others the right to lay water pipes, was a special act passed by and running along through the two Houses of the Legislature *pari passu* with the general law of 1858 and signed on the next day, purporting to grant to Mr. Ensign pretty much the same rights that are granted under the general law; but because it is special it has since been held to be unconstitutional by that court, the court holding that the Spring Valley Water Works was permitted to exist under and derived all its powers from this general law of 1858, to which I have already called your Honors' attention, and the act of 1853, the general corporation law, so that this Ensign act is practically wiped out of all consideration, and we look to the general law of 1853 as the law governing the Spring Valley Water Works; and we find now that before any other. corporation had introduced water into the city and county of San Francisco all had been placed upon the same common level. When I say "all," I say so because only the San Francisco City Water Works had ever made that attempt. They were all placed on the basis of this general law, so that there is no corporation, and never has been any, in active operation under the act of 1852. But the act of 1858 steps in, and even if it be true—we do not concede that it is, and I have in my brief to which I desire to call your Honors' attention for I shall not take the time to discuss it as elaborately as I have there taken the position, and I think it a sound one, that notwithstanding the declaration in 1852 based upon the assumption that the city had the right to fix the rates for the water, it never had such a right; but if it had, by this act of 1858 it covenanted that it would not exercise it except in a particular form. As an inducement to this plaintiff, or rather to any persons who should see fit to incorporate under the act of 1853, the general trading corporation law, for the purpose of supplying cities and towns with water, it extended to them the right to acquire property by eminent domain, as the Legislature had before done, but it says the property which you do acquire shall be used exclusively for supplying cities with water; and as a further inducement to you to invest your capital in this work—a work which those of your Honors who are familiar with the climate and character of California can see was one of great importance to the public—those of you who do invest your capital for this purpose shall have the further guarantee that you shall have a voice in the fixing of the rates which shall be collected for the water supplied; consequently it provided that these rates, even though the state might have in its sovereign capacity the right to fix and prescribe the rates to be collected, should be fixed in something like the same manner that the value of property is to be fixed when condemned for public use; that is to say, it shall be submitted to a judicial tribunal, one vested with the power to investigate and to inquire into the value of the property, the cost of the enterprise, the cost of introducing the water, and that judgment shall be one fixing these rates; this tribunal shall be a board of arbitrators between the municipality which is supplied with water and the company that supplies it.

With that assurance, under that promise on behalf of the State, within thirty days after the passage of this act this plaintiff was organized for the purpose of supplying the inhabitants of the city and county of San Francisco with pure, fresh water, not from any diminutive source of supply to be found within its limits, but from any place or places where the water could be had. Under that assurance this plaintiff proceeded to construct very costly works, running up into many millions of dollars, bringing water from the distance of twenty-five miles or more into the city and county of San Francisco, laying some 200 miles of mains through the streets of the city, and so distributing the water throughout the extent of that city as to supply the wants of the inhabitants for domestic purposes, and so distributing it as to render it possible to build on that sandy waste, where before the organization of this company and the introduction of this water buildings of any value had not been erected beyond the line from which water could be drawn from the bay; so advancing the interests of the city and encouraging improvement as to have raised the assessment roll of that city from thirty millions to nearly $300,000,000.

This being done, in 1879 the people of the State organized a constitutional convention to present a new constitution for the government of the State, and out of that came what is now denominated the constitution of 1880, and the fourteenth article of that constitution undertakes to take away this right which had been guaranteed to parties engaged in this business and to grant it exclusively to the board of supervisors of the city and county of San Francisco.

The CHIEF JUSTICE: Have you a copy of the constitutional provision in the pamphlet of which you have spoken?

Mr. FOX: In my brief your Honors will find that article of the constitution copied. The first section of that article reads as follows:

> "The use of all water now appropriated, or that may be hereafter appropriated, for sale, rental, or distribution, is hereby declared to be a public use and subject to the regulation and control of the State in the manner to be prescribed by law: *Provided*, That the rates or compensation to be collected by any person, company, or corporation in this State for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed annually, by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances, or legislative acts, or resolutions are passed by such body, and shall

continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates where necessary within such time shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the Legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchises and water-works of such person, company, or corporation to the city and county, or city or town, where the same are collected, for the public use."

Section 2 of the article provides that—

"The right to collect rates or compensation for the use of water supplied to any city, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised, except by authority of and in the manner prescribed by law."

Your Honors find us in this position: We had entered into the business of supplying water to the municipality and inhabitants of the city and county of San Francisco under an assurance that while we complied with the obligations resting upon us of introducing the water and supplying it for domestic purposes to whomsoever should demand it at reasonable rates to be fixed, and supplying it for public use free of charge in case of fire or great necessity, under the inducement that we should have the right to have a voice in fixing these rates, and then the people by this constitutional amendment undertake to take from us that right and transfer it to the political representatives of the consumers of our product, those who take not to use, as in the Elevator case and in the Granger cases, leaving possession and title in us, but to take absolutely and consume—to take the property itself.

The Supreme Court of that State many years ago, in the case of Heyneman *vs.* Blake, 19th volume of California Reports, by the lips of Mr. Justice Field, then sitting upon that bench, declared that the water so collected in reservoirs and pipes was private property, the subject of sale like any other goods, wares, and merchandise, and that declaration has never been questioned by any judicial authority so far as I know.

We see here that there is an attempt, after having once agreed that for our property the price snould be fixed by a tribunal judicial in its nature, composed of commissioners selected by each party in interest, to take that from us, from the board of arbitrators, from all judicial tribunals whatever, and to place it in the hands of those who consume the water, who are themselves presumed to be consumers, and who are the political representatives of all the other consumers of the water and purchasers of the property. We have insisted and contended here that that is, first, an exercise of power that the State never possessed, the power to fix the price of the commodity, the price at which we shall sell our product for public and for private use. I have discussed that at some length in my brief. I have not the time to elaborate it now.

Second. It has undertaken to destroy and abrogate—not only to impair, but absolutely to abrogate—the solemn contract which the State made with us as a consideration for our engaging in this business, that these rates should be fixed by a board of commissioners mutually chosen by the parties interested.

Mr. Justice FIELD: Your argument treats water as a commodity, not as one of the elements which cannot be subjected to private ownership absolutely.

Mr. FOX: We treat it as a commodity, and treat it as such upon principle in the first place, and upon authority in the second place. Though it is a natural element so long as it remains in the air which we breathe or runs in the channels of nature, yet when it is collected in reservoirs and pipes it becomes private property, and just as much an article of purchase, of sale, a chattel, as that other natural element which our friends in Pennsylvania are taking from the earth and carrying to the great commercial cities where oil is sold in pipes, stored in tanks and reservoirs, as we do. That too is an element of nature. They dig into the earth for it; we construct our reservoirs on the earth and catch it mainly from the clouds and store it for use, transport it through these expensive works for distribution to these people, and we say that it is property; and when it is taken by the municipality of San Francisco, or by the inhabitants of that municipality, they take not merely its use, leaving in us title and possession to be used over and over again, but they take the absolute property itself and consume it as much as if it were bread, as if it were wine, or any other commodity. Hence we say the State has no power to exercise that authority; but if it had, as an inducement to us to invest millions of dollars for the purpose of supplying a public want which the State either dared not or could not attempt to supply in those days, it covenanted that the price should be fixed by a board of arbitrators, and now has undertaken to take it away in violation of that contract.

It also takes this property, as we claim, without due process of law. That branch of the case I shall leave more particularly to be argued by my colleague, Mr. Newlands, who has given it much attention.

It is also the appropriation of private property to public use without due compensation. I do not mean by that to say that the Legislature have in terms authorized the municipality of San Francisco to take this water without any compensation. They have provided that the board of supervisors shall fix the rates; but it is held in our State in the case of Spencer Creek Water Company, which I have cited in my brief, and in numerous other cases it has been so held, that to ascertain this compensation is a judicial proceeding and belongs only to the judicial department of the Government. Consequently that which undertakes to take property and appropriate it to public use without ascertaining the compensation by agreement between the parties, or by resort to the judicial tribunals of the State in such form as may have been prescribed by the Legislature, is an appropriation of property without just compensation, and here the only method prescribed for ascertaining or fixing this compensation is to put it into the hands of the local legislative body itself, the political representatives of the consumers. It has been held frequently in cases which are cited in my brief that the Legislature itself cannot fix the compensation which shall be paid for private property taken for public use. The Legislature may determine what is necessary to be taken, but to determine the compensation that shall be paid must be referred to the other department of the Government, and it must become a subject of judicial inquiry and investigation.

We say also that it deprives this plaintiff of the equal protection of the law. I am hastening along without taking much time to more than state these propositions. It does it in this——

Mr. Justice Miller: Before you leave the question of the contract, permit me to say that the point in my mind is that the constitution of 1849 contained a clause authorizing the Legislature to repeal and amend all acts of incorporation.

Mr. Fox: The constitution of 1849 did contain that clause, and there are two answers to that suggestion. First, in the form of an inquiry as to whether this act is a part of the charter. That constitution provided that corporations may be formed under general laws, and that they shall be subject to alteration or repeal. Now this act which guaranteed to us these privileges, although entitled "An act to provide for the incorporation of water companies," as I said, makes no provision for the formation of any corporation whatever. It is not under that act that the corporation has its being as such.

The Chief Justice: It refers to the act of 1853, and does incorporate the provisions of the act of 1853.

Mr. Fox: The most that can be made in that regard of the act of 1858, is that it is an amendment of the act of 1853. That is looking at it in the most favorable light on behalf of the city in response to that suggestion, that it is an amendment of the act of 1853 so far as it relates to water companies, and in that way becomes subject to amendment, alteration, or repeal; but when so subject, I submit with all due deference, if your Honors please, the power must be exercised, first, reasonably. This court has so held frequently; so held in the cases which are supposed to mitigate against us, in Munn *vs.* Illinois and in the Granger cases. Second, it cannot be so exercised as to destroy vested rights; rights of property already acquired. It may be true that in one sense we can hardly say fixing the compensation to be paid for water in the future is a destroying or taking away of the title of that which we have acquired, but in another sense I think your Honors will see it is really destroying the value of that which we have acquired, and which has cost large amounts of money, running up into the neighborhood of fifteen or twenty million dollars, taking away its value, the value of that which was invested under this covenant of the act of 1858, that we should have the right to have a voice in fixing these rates.

I have discussed that subject, as also have my colleagues, in our briefs, and I shall ask your Honors' indulgence to examine them in that respect.

Mr. Justice Miller: I think that the only question in this case is as to the effect of the reserved-power clause in the first constitution.

Mr. Fox: Even with that question, if your Honors please, we feel that the attempt here is one which so affects the property of the company acquired under the act of 1858, as that the court, in the exercise of that justice and that fairness which we know will be exercised by this court, cannot say was a legitimate amendment of the act under which we are incorporated; that it was a permissible one under the Constitution and laws of the United States.

Mr. Justice MILLER: What is the language of the constitution on that subject?

Mr. FOX: It is found in article 4, section 31 of the original constitution of the State:

> "Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed."

It is not unlike the provision which is found in many other constitutions in that regard.

Mr. Justice MILLER: We considered the question of what such clauses meant very fully in the case of Greenwood *v.* The Freight Co. It was considered very fully.

Mr. FOX: I have examined and in my brief discuss somewhat the cases so far as they had been announced at the time the brief was written, and my colleagues have followed up the later cases on the subject, and while, with your Honor, we think that is, if not the only point, at least an important point and a very important point in this case, we feel confident that the amendment here is such as is not authorized by that provision of the constitution of 1849.

Mr. Justice MILLER: I concur with you that this is rather an extraordinary exercise of power; but the pith of the whole question is whether the Legislature did not have the power under that reservation.

Mr. FOX: We claim also that it takes from us the equal protection of the laws, for that there is no other class of corporations or persons under the laws of that State, or so far as we know under the laws of any State or of the Nation, whose property is taken either for public or private use, or which provides any statute by which any property can be taken either for public or private use without submitting the question of the consideration of the value, of the just compensation therefor, to a judicial tribunal of some character. We concede that the Legislature may specify the tribunal and the mode of proceeding, but it must exercise that "due process of law" which requires that there should be investigation and adjudication in order to determine what shall be the compensation to be paid.

Again, in transferring to the board of supervisors of the city and county of San Francisco the right to fix the rates which shall be paid for water for municipal and private purposes in that city, this provision of the constitution and the act of the Legislature passed under it in 1881 placed the power of fixing these rates in the hands of the persons who become the purchasers and consumers of our product. Presumably, as I said in the beginning, the members of the board of supervisors themselves consume it. In law and in fact they are the political representatives of those who are the only consumers and the only purchasers of our product, the legislative officers of the municipality, the political representatives of the private citizens who are the consumers of this water, thus making them in every instance judges in their own case.

Mr. Justice **Field**: Does the city, independently of the inhabitants, take any water?

Mr. **Fox**: Oh, yes; the city is by far the largest consumer of all the water that is taken. As if the article in the constitution were insufficient for the purpose, the Legislature, in passing the act of 1881, to carry into execution that article, provide, (Statutes of 1881, pages 54 and 55,) in section 6, that "rates for the furnishing of water shall be equal and uniform. There shall be no discriminations made between persons, or between persons and corporations, or as to the use of water for private and domestic and public or municipal purposes: *Provided*, That nothing herein shall be so construed as to allow any person, company, association, or corporation to charge any person, corporation, or association anything for water furnished them, when, by any present law, such water is free."

Then the next section, section seven, provides that if charges are made for water supplied in excess of the rates fixed by the board of supervisors, the company so charging and collecting shall forfeit its property and works to the municipality upon the complaint of any rate-payer. It shall upon complaint of such board of supervisors, "or of any water rate-payer, and upon conviction before any court of competent jurisdiction, shall forfeit the franchises and water works of such person, company, association, or corporation to the city and county, city or town, wherein the said water is furnished and used."

I call your Honors' attention to that provision as well as to the clause of the constitution for a moment, because my friend Judge Rhodes has claimed in a supplemental brief which he files here that we have no right to complain of the act of the people in the adoption of this article of the constitution and this legislation, because by the same act the people and the Legislature have relieved us (and so the Supreme Court of the State held) of the obligation to furnish water free of charge "in case of fire or other great necessity." If that be true, it does not follow, if we had a contract on the subject, that we were bound to accept these provisions. We had a right to be heard, and we have a right to be heard, in saying whether the relief from that obligation is a consideration satisfactory to us for surrendering that other right, which is guaranteed to all other people, of having at least a voice in saying what shall be the price at which our property shall be held. That is the first answer to that argument.

The second is that we have never accepted this proposition; we have never accepted this relief. It is true, as the counsel says, that the Supreme Court of that State have been asked to compel the board of supervisors to fix rates for water supplied for municipal purposes as well as for that supplied for other purposes—but why? Because we have been, ever since this constitution was adopted, acting under duress in defense of life itself. By the very provision of the act of 1858 we were bound to use our property for this particular purpose, and could use it for no other; we could not withdraw it from the use. By the provision of the constitution which they invoke against us the same rule is applied, and by the further provision of that constitution, as well as of the act of 1881 passed in pursuance of it, we are liable to absolute forfeiture of our property if we fail to use it for the purposes for which it was acquired and to which it was appropriated, or, if in so using it, we collect rates other than those established by the board of supervisors.

Mr. Justice FIELD: Allow me to ask whether your company did not ask the Supreme Court of California to compel the supervisors to fix the rates under the new constitution?

Mr. FOX: That is true so far as municipal uses were concerned.

Mr. Justice FIELD: I shall be obliged to tell the judges that in consultation, and therefore I asked the question to get your answer to the suggestion.

Mr. FOX: We say that does not affect us for this reason, first, a rate-payer applied to the Supreme Court for such an order. There was doubt as to whether a rate-payer, acting alone, could be heard in the matter; and at length it was deemed best that the company should do so, and the very life of the company depended on their doing it, pend ing this hearing, for the reason that unless rates were established by the board of supervisors that could be collected, and that the company, assuming that the law was good, had a right to collect, we must conduct our business without any compensation whatever during all the time that should intervene between the adoption of this constitution and the hearing of this case in this court, or else be liable to the forfeiture of our property, because here it is expressly provided that the rates must be uniform; that they must rest alike upon private consumers and upon the municipal corporation, and if they did not, as the Supreme Court has decided in another case, an ordinance that did not so make them uniform would be void, and then there would be no rates which we had the right to collect; and in the attempt to collect any rates we were subject to complaint by the board of supervisors, or at the instance of any rate-payer in the city, for violation of the provisions of this act, and upon conviction, both the constitution and the statute provided that our property should be forfeited to the use of others. Whether they could carry into effect that forfeiture is a question which we need not discuss here, but it was one which it was too perilous for this corporation to meet, and let it stand there with no ordinance passed in pursuance of this statute, if they undertook to act on it at all.

So that, as I said before, all that this corporation did, in the way of seeking any relief other than in this case, has been done under duress for the purpose of saving a forfeiture of its property, and saving the necessity of carrying on these works and supplying that municipality and its people for a long number of years without any compensation whatever, and in doing so the company did not acknowledge that this was the law of the land; they carefully avoided in their appeal to the Supreme Court of California acknowledging that the law of the land was that the board of supervisors could fix those rates; but they said: "You have declared that they could, you have declared that they had the right to do it, and now we say that if they do it they must do it as prescribed by the law, which you hold to be law under which they are governed; they must do it in whole, and not in part;" and we submitted that question to them. That is to say, the board of supervisors undertook to fix the rates which should be paid by private consumers, without fixing rates for water supplied for general municipal purposes, and while we denied their right to fix rates at all, inasmuch as the Supreme Court had said that power did rest in them, and that unless they did it in conformity with the constitution and the statute their ordinance would be void, we applied to the court. We conceded that if they fixed it at all, they must fix it for the municipality as well as for individuals. We could not collect any rate otherwise. We were liable, if we attempted to collect any rate at all under an ordinance that did not prescribe rates for the city as well as for private consumers, to an attempt, at least, to forfeit our property, an attempt which this constitution itself said should be good and binding upon us.

I find that I have already taken more than my hour, and, if your Honors please, I will yield to my colleague, Mr Newlands.

ARGUMENT

OF

Mr. FRANCIS G. NEWLANDS

IN THE

Supreme Court of the United States,

TUESDAY, NOVEMBER 20, 1883,

IN THE CASE OF

SPRING VALLEY WATER WORKS,
Plaintiff in Error,

vs.

ANTONE SCHOTTLER AND OTHERS,
Defendants in Error.

REPORTED BY D. F. MURPHY.

Mr. NEWLANDS: May it please the court, I shall confine myself to the proposition that article XIV of the new constitution of California, which declares the use of water theretofore appropriated for sale, rental, or distribution to be a public use, and provides that the compensation for water supplied to any municipality or its inhabitants shall be fixed by the board of supervisors or other governing body of such municipality, taken in connection with obligation imposed by the charter of the plaintiff in error, the act of 1858, that the reservoirs, ditches and canals acquired by this company shall be used exclusively for the purpose of supplying San Francisco with water, and in connection with the further obligation imposed by that act, that the company shall continue to furnish water so long as the supply permits, is in effect to deprive this company of its property without *due process of law*, in violation of the Fourteenth Amendment to the Federal Constitution; and in discussing this question I shall not take into consideration the contract as to the mode of fixing the compensation for water contained in section 4 of the act of 1858, but shall regard this company as engaged in the business of supplying water prior to and at the time of the adoption of the new constitution, without reference to such contract.

And before entering upon this question permit me to call your Honors' attention to the liberal construction which has always been given by this court to the limitations contained in the Federal Constitution in favor of private right and against the power of the Government. Your Honors will recollect that with reference to that provision of the Federal Constitution which declares that no State shall pass a law impairing the obligation of a contract, this court has held that it applied not only to executory but to executed agreements; that it applied to contracts between the Government and the individual; to charters, grants by the Government to individuals, and even stipulations limiting the power of the Government with reference to taxation and the power of eminent domain. It went further than that, and, carrying out the full spirit and intent of this constitutional limitation, declared that the decision of a State court adjudging a statute unconstitutional which had previously by that court been declared constitutional, and upon the faith of which prior decision bonds had issued and money been paid by individuals, violated the obligation of a contract and came within the prohibition of the Federal Constitution; and thus the Constitution was made to read not only that no State shall pass a law impairing the obligation of contracts, but also that no decision of the judiciary of such State declaring a statute unconstitutional which had previously been decided to be constitutional, shall impair the obligation of a contract entered into pursuant to such statute and upon the faith of such prior decision. So, also, with reference to that provision of the Federal Constitution which prohibits the States from passing bills of attainder, your Honors determined that such prohibition applied not only to the bill of attainder as known at common law, which was a legislative judgment inflicting capital punishment, but to those other bills known as bills of pains and penalties, inflicting a lesser degree of punishment, and held in the Test-Oath cases* that statutes preventing priests from administering the sacrament, and lawyers from practicing their profession, unless they would swear that they had never borne arms against the Government or given aid to its enemies, were in their spirit and effect bills of attainder within the meaning of the prohibition of the Federal Constitution.

And the court holding that these statutes, though disguised under the form of regulation of certain offices, occupations, and employments, to be in effect legislative judgments inflicting punishment, and interpreting the Federal prohibition consistently with the largest personal liberty, declared:

> "We do not agree with the counsel of Missouri, that to punish one is to deprive him of life, liberty or property, and that to take from him anything less than these is no punishment at all. The learned counsel does not use these terms, life, liberty, and property, as comprehending every right known to the law. He does not include under liberty, freedom from outrage on the feelings as well as restraints on the person. He does not include under property, those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors."

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* Ex parte Garland and Cummings *v.* Missouri, 4 Wallace, p. 320, et seq.

So also with reference to that provision contained in all constitutions, both Federal and State, which declares that private property shall not be taken for public use without just compensation: this court held that such prohibition covered not only the taking of the title but injury to the possession; and in the case of Pumpelly *v.* Green Bay Company (13th Wallace, 166,) declared:

> "It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely; can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use."

And it held that a statute passed by the Legislature of Wisconsin, in the exercise of the *police power*, for the purpose of improving the navigation of the Fox River, authorizing the erection of a dam which necessarily flooded the adjoining land, was in effect a taking of the property without just compensation.

So, also, in a recent case, the Court of Appeals of New York, though holding that the owners of property adjoining a street in New York city had no interest whatever in the street itself, but simply had a right to use the same, as all owners of property adjoining streets have, yet held that a statute authorizing the construction of an elevated railway on such street without compensation to abutting proprietors impaired the value of the adjoining property, and was in effect a taking without just compensation.*

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* Story *vs.* Elevated Railway Co., 90 N. Y., p. 122.

So, also, the courts, both Federal and State, have uniformly held that the provision of the Federal and State constitutions which declares that property shall not be taken for public use without just compensation, implies that the just compensation shall be ascertained by some fair and impartial tribunal. The only limitation on the exercise of the eminent domain contained in the Federal Constitution and the State constitutions is that just compensation shall be given; and yet the courts have determined that this is a judicial question, and that the compensation must be ascertained by some impartial tribunal, and not by the legislative department of the Government.

The construction given by the courts to these constitutional limitations apparently conflict with the general rule that as between the Government and the individual the construction should be favorable to the former. But there is really no inconsistency. In the case of a grant from the Government to an individual of a franchise or a charter, the Government is the grantor and the individual the grantee; no implication is to be indulged in favor of the grantee, and every doubt is resolved in favor of the grantor. Nothing passes except what is defined in the grant. In the formation of a constitution conferring certain powers upon the Government, the people are the grantors and the Government the grantee. Every limitation upon the powers granted is, therefore, to be construed liberally in favor of the grantor and against the grantee.

It follows, then, that these limitations contained in the Federal Constitution and its amendments ought to be liberally construed in favor of private right and personal liberty as against the powers of the Government. The words should be construed in no narrow sense, but should be given as broad and liberal a signification as the language used will permit, and no powers should be exercised by the Government which are not absolutely essential to the protection of society. When exercised, all such powers as are not inherently legislative, which trench upon or invade private right, which limit and impair private property, should be administered through impartial tribunals, proceeding according to customary and established methods of inquiry, and rendering judgment only after notice to the parties interested, after giving the parties an opportunity to be heard, and after a full and fair investigation of the facts.

Applying, then, these canons of construction to the fourteenth amendment, I ask your Honors what interpretation is to be given to it? Does the word *life* apply only to the physical existence, or does it extend to the members of the body, to the faculties of the mind, which make life enjoyable? Does the word *liberty* infer mere absence from physical restraint, or does it infer the right to the pursuit of happiness and to engage in the vocations which are suited to one's capacity? Does the word *property* mean only the title or the possession, or does it include all the incidents and attributes of property,—the right to use, the right to control, the *jus disponendi?* Does that act of the Government fail to deprive a person of his life or liberty or property which mutilates his limbs, or takes his reasoning faculties, or prevents him from pursuing his vocation, or deprives him of his dominion over the things that he owns, or of the *jus disponendi*, leaving to him the apparent right without the benefits which attach to ownership? I take it that no narrower meaning can be attached to the word *deprived*, when applied to property, than can be applied to the same word when applied to life or liberty. Any impairment of what are regarded as its essential incidents and attributes must come within the term. "Property," says Webster, "is the exclusive right of enjoying and disposing of a thing; ownership." Bouvier says: "It is the right to enjoy and dispose of certain things in the most absolute manner. * * * * So, that property considered as an exclusive right contains a right in one to use those things, and the right to dispose of them, either by ex-changing them for other things, or by giving them to another person without any consideration, or even throwing them away."

The very essence of property is its exchangeable value. To permit the owner to have no voice in determining that value is to deprive him of an essential right of property. The free *jus disponendi* is inseparable from the meaning of the word property.

Do the words "due process of law" mean simply a legislative act, or are they to imply an orderly proceeding adapted to the nature of the case, involving notice of some kind to the parties interested, the right and opportunity to be heard and a judgment upon the facts?

I know some law writers and jurists have indicated that the term "due process of law" is synonymous with "law of the land" as used in Magna Charta. I take issue with that construction. Magna Charta was simply intended to be a limit upon the power of the King. In the time of King John Parliament hardly existed. Legislation was in its infancy then. The Norman kings were in the custom, occasionally, of calling together the council of the realm, but that council consisted simply of the barons, and had no popular element. It was not until after Magna Charta was granted that Parliament, as a popular body in part, was brought into being, when King John ordered the sheriffs to summon four discreet persons from each shire to consult with him and the barons of the realm with reference to the affairs of the kingdom. There was no object at that time in limiting legislative power; the only existing necessity was to limit the power of the king. The sovereign at that time, without the intervention of legislation, levied fines and imposed exactions upon the people, upon the barons as well as the common people, and, finally, they made common cause against him, and with arms in their hands exacted from him the Great Charter limiting the power of the sovereign and containing among others the concession that no person should be deprived of life, liberty, or property except by the judgment of his peers or the law of the land.

Now, I ask what did "law of the land" mean, judged by the history of that great event and the nature and character of the charter itself? It meant simply the law of custom—the common law—and the law of Parliament. There was, as I have already stated, no need of limiting the power of legislation, because there were no legislative abuses. The people were just entering upon a representative government. There was no need at that time to limit its power.

But how different the conditions when our forefathers formed our government! They determined to have a republic; there was no kingly power to limit; there was no executive power to limit. The executive only had the powers conferred on him by the Constitution and the power to execute the laws made by the legislative department of the Government. The very object was to restrain and limit the power most likely to be abused, the power of the Legislature—that political body closely allied with the people—reflecting its passion, its prejudice, and its interest. It would have failed utterly to limit it had it used the phrase "law of the land," in the same sense as used in Magna Charta, for that phrase simply implied the common law and the acts of Parliament. In Magna Charta, when the king was limiting his own powers, it was entirely consistent with the existing exigency for him to say that he would deprive no person of life, liberty, or property save pursuant to the common law or acts of Parliament; but when our Constitution was being framed it would have involved the grossest inconsistency to say that no person should be deprived of life, liberty, or property save pursuant to the common law or such acts as Congress might thereafter enact, or, when the fourteenth amendment was being framed, to say that no State shall deprive any person of life, liberty, or property except by act of the Legislature. By Magna Charta was determined the supremacy of the law over the will and power of the monarch. It was designed to check the oppressions and exactions of ambitious kings. By the Federal prohibitions was determined the supremacy of the fixed principles of the administration of justice over the will of the Legislature. They were designed to check legislative violence.

To measure the power of the legislative department of government under our form of government by the powers of Parliament, is to say that the lesser is equal to the greater; that limited power is equal to absolute power.

There are no restraints whatever upon the powers of Parliament. We speak of the British Constitution. It consists simply of the traditions of the English people. They have no written constitution defining the powers of the Government. Parliament is omnipotent. It can change the succession; it can pass bills of attainder; it can destroy the obligation of contracts; it can by a legislative trial, judgment, and conviction, deprive a man of life or liberty; it can take the property of A and pass it to B, and can take private property for public use without compensation. With such extraordinary and transcendent powers it is idle to look to the English precedents and authorities to determine what the words "due process of law" mean. The words "law of the land," as used in England, cover not only the common law, but also everything that Parliament did or could do.

Let us turn, then, to the utterances of our statesmen and jurists* for information and light. Mr. Webster, the great expounder of the Constitution, says:

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*In Taylor *v.* Porter & Ford, 4 Hill, 140, the court say: "The words by the law of the land, as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two Houses, 'You shall be vested with the leg-

“‘By the law of the land’ is most clearly intended that general law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of general rules which govern society. Everything which may pass under the form of an enactment is not the law of the land.”

Chancellor Kent says:

“The better and larger definition of due process of law is that it means the law in its regular course of administration through the courts of justice.”

In the case of Wyncham *v.* The People, (13 New York Reports, p. 392,) Selden, Justice, says:

“To give this clause [of the Constitution above referred to], therefore, any value, it must be understood to mean that no person shall be deprived by any form of legislative or governmental action of either life, liberty, or property, except as a consequence of some judicial proceeding appropriately and legally conducted. It follows that a law which

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islative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose.’ In other words, ‘You shall not do the wrong unless you choose to do it.’ * * * “Due process of law cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for asserting guilt or determining the title to property. * * * The same measure of protection against legislative encroachment is extended to life, liberty, and property; and if the latter can be taken without a forensic trial and judgment, there is no security for the others. If the Legislature can take the property of A and transfer it to B, they can take A himself and either shut him up in prison or put him to death. But none of these things can be done by mere legislation. There must be due process of law.”

“By due process of law is to be understood the law in its regular course of administration through courts of justice.” (State *v.* Beck, 23 Minn., 413; Rowan *v.* The State, 30 Wis., 129; Barker *v.* Kelley, 11 Minn., 480.)

In Stewart *v.* Palmer, 74th New York, p. 191, the Court of Appeals said: “It is difficult to define with precision the exact meaning and scope of the phrase ‘due process of law.’ Any definition which could be given would probably fail to comprehend all the cases to which it would apply. It is probably wiser, as recently stated by Mr. Justice Miller, of the United States Supreme Court, ‘to leave the meaning to be evolved by the gradual process of judicial inclusion and exclusion, by its own inherent force extinguishes rights of property, or compels their extinction without any legal proceedings whatever, comes directly in conflict with the Constitution."

Now, I ask whether this constitution, in connection with the act of 1858, does not by its own inherent force extinguish rights of property without any legal proceedings whatever? Bear in mind that the act of 1858 provides that all the reservoirs, pipes, &c., of this company must be exclusively used for this particular purpose. The company, then, cannot discontinue the use; it is under obligation to furnish water "so long as supply permits." It has been in no manner relieved of the obligations which are imposed by the act of 1858. The only change which has taken place, if any change at all, has been that the tribunal which is to determine the compensation has been changed.

Now, I claim that any process, whether immediate or gradual, which compels an individual or a corporation to furnish a commodity and deprives him of all voice in de-

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as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.' (Davidson *v.* New Orleans, 96 U. S.. 104.) It may, however, be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing or an opportunity to be heard is absolutely essential. *We cannot conceive of due process of law without this.*"

Cooley, in his work on Taxation, after a careful review of the adjudged cases, declares that the protection of this limitation applies even to taxation. He says: "We should say that notice of proceedings in such cases and an opportunity for a hearing of some description were matters of constitutional right. It has been customary to provide for them as a part of what is due process of law for these cases, and it is not to be assumed that constitutional provisions, carefully framed for the protection of property, were intended or could be construed to sanction legislation under which officers might secretly assess one for any amount in their discretion, without giving him an opportunity to contest the justice of the assessment."

See, also, Jones *v.* Perry, 10 Yerger, 73, in which the court holds that "the exercise of such a power by the British Parliament is no precedent by which our Legislature should be governed."

All these authorities show that the courts of justice of this country have not measured the meaning of the words "due process of law" either by what prevailed at common law or by what the Parliament of England did enact or could enact.

termining the compensation, and submits that compensation not to a fair and impartial tribunal, but to the buyers themselves or their political representatives, deprives the person of his property without just compensation just as much as it would were the Legislature to compel this company to surrender its reservoirs, and its lakes and its ditches and its pipes, at a price fixed either by the Legislature itself or by the municipality. It makes no difference whether the process which compels them is a gradual one or not. It is true that the board of supervisors fix the compensation in the shape of an ordinance; that is a legislative judgment as to the compensation; but the company during the entire year following the passage of the ordinance is compelled to furnish the commodity and to accept only the price fixed by the buyers or their political representatives.

Right here the inquiry suggests itself as to whether water is property; as to whether there can be property in water. It is claimed by some of the advanced thinkers, whom the late agitation in California has brought into prominence, that water is as free as the air we breathe.

Your Honors will please bear in mind that San Francisco is situated at the end of a narrow peninsula, the ocean on one side and the bay on the other, far removed from any natural source of supply, and that the rain in that climate falls only during the winter season. The plaintiff in error catches the waters as they fall from heaven upon its own lands and impounds them. It has constructed dams across the valleys between the bay foothills and the mountains, and has thus impounded these waters and made immense artificial lakes. The water is caught upon its own lands; stored in its own reservoirs; carried in its own pipes to San Francisco, a distance of twenty-five miles, and there distributed to its customers. The Supreme Court of the State of California say with reference to the San Francisco City Water Works, a corporation organized under the act of 1853, in the case of Heyneman *vs.* Blake, 19 Caliornia Reports, 595:

> "Water, when collected into reservoirs or pipes, and thus separated from the original source of supply, is personal property, and is as much the subject of sale, an article of commerce, as ordinary goods and merchandise."
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> "Ice companies organized to furnish the inhabitants of a city with ice, and gas companies organized to furnish them with gas, and the company in question organized to supply them with water, all stand upon the same footing. They are engaged 'in a species of trade or commerce,' though not in the technical acceptation of the terms 'trading' or 'commercial corporations.'"

It is said there is no property in the water of a running, navigable stream; that it is *publici juris;* but that is not this case, for this water is impounded by the plaintiff in error upon its own lands. From the time that it falls from the clouds to the time it is distributed to the consumers, the only point of time at which by any stretch of the imagination it can be called *publici juris*, is when it is suspended in the clouds in the shape of moisture.

Mr. Justice FIELD: Would not this water that you say is impounded have found its way if not impounded into the natural streams?

Mr. NEWLANDS: It would have found its way into the Bay of San Francisco.

Mr. Justice FIELD: If you did not catch it, it would find its way into those streams which are subject to general use?

Mr. NEWLANDS: It would find its way by a small natural water-course a few miles in length, dry in summer, called San Mateo Creek, into the Bay of San Francisco, which is salt, and entirely useless for any such purpose.

Mr. EDMUNDS: Most of it would have found its way back to heaven without going into the bay at all, according to my observation.

Mr. Justice **Bradley**: Do you say this company had the use of all the supply which San Francisco could get?

Mr. **Newlands**: No, sir. There are quite a number of artesian wells in San Francisco which supply a quantity of water equal probably to about one-fourth or one-fifth of the supply of the plaintiff in error. There is a large body of water under San Francisco which can be reached by artesian wells, and a number of small companies have been formed, and are utilizing this source of supply, and are competing with the plaintiff in error. They have the right to lay pipes in the streets, as this right is conceded by the new constitution to every person, natural or artificial, and competition is increasing rapidly.

Mr. Justice **Field**: And there is Lake Merced.

Mr. **Newlands**: There is one lake, but its supply is very limited, and there is some doubt with regard to the character of the water, as it immediately adjoins the ocean and is sometimes brackish. But every source of supply which this company utilizes is upon its own lands, even Lake Merced.

The **Chief Justice**; Has this company substantially the control of all the sources of supply except the artesian wells?

Mr. **Newlands**: Unless you go some distance further; other parties can impound water in the same way; there are numerous valleys in the mountains where water can be impounded. It is only a question of expense.

Mr. Justice **Miller**: Do you mean to say that you dam and collect all the drainage within certain limits?

Mr. **Newlands**: In San Mateo county this company owns, I think, about 18,000 acres of land, which constitutes almost an entire valley, bounded on one side by the bay range hills, and on the other side by the coast range of mountains, there being but one exit from that valley through a narrow pass, through which what is called San Mateo Creek flows into the Bay of San Francisco, but that is a stream of water that flows only in the winter when the rains are falling, and is entirely dry in summer. The company has constructed dams at different points in this valley, and has thus made three large artificial lakes. It is obliged to store water not simply for a year's supply, but for two or three years, and hence the great expense to which it has been subjected.

It appears, then, that the water of the Spring Valley Water Works can at no point of time be considered as *publici juris*, except, perhaps, when it is in the clouds.

If there is not property in water there is property in nothing. All the external things of nature are God's free gift to man. But in an artificial society property has grown up, and consists in the dominion which the individual asserts and exercises over and his possession of such external things. Land is free in a state of nature, and no property is acquired in it until an individual or a government asserts dominion over it. There is no property in animals *feræ naturæ*, yet if I catch a lion and cage him he is my property. So it is even with the water of a running, navigable stream. If I put it in a bucket or store it in a reservoir, and thus reduce it to possession, it is my property.

I claim, then, that this water is property, and that wherever the power of the Government is to be exercised with reference to it, either through that branch of the police power called the eminent domain, or through that other branch of the same power called the regulation of public uses, and the exercise of such power involves the determination of the just or reasonable compensation either for the property or the use, such compensation must be ascertained by a fair and impartial tribunal, proceeding pursuant to the sanctions which usually characterize judicial inquiry.

The courts have determined, with reference to the eminent domain, that the legislative power of hte Government ends when it has determined that the use is a public one, that the property is necessary for the use, and when it has provided a fair and impartial tribunal for determining the compensation. The courts, Federal and State, have uniformly determined—and there is not a decision to the contrary—that this just compensation must be ascertained by a fair and impartial tribunal. The Legislature cannot fix it. It cannot delegate the power to a corporation, which has the authority to condemn, to fix it.

If we look into the judicial and legislative history of England for the purpose of determining the nature of the power of eminent domain, as was done in Munn *v.* Illinois, for the purpose of determining the nature of the power of regulating public uses, what warrant do we find for holding that the determination of the just compensation is a judicial question? Parliament has the power to take the property of an individual for public use without compensation. If it has that power it certainly has the power to determine the compensation itself. There is no limitation in the various constitutions—Federal or State—as to what department of the Government shall determine the just compensation. They simply provide that just compensation shall be given. Why was it that the courts did not determine that the power of eminent domain was a legislative power? that the only limitation upon that power was that just compensation should be rendered, and that in the exercise of that power the Legislature itself could determine the compensation? Simply because the fixing of the compensation in such manner would not be *due process of law,* which implies notice, an opportunity to be heard, proofs and a fair tribunal.

Now, in this case it is admitted that if the State government should seek to condemn the reservoirs and the canals and the pipes of this company for public use, the power of the Legislature would be exhausted when it declared the use a public one, declared the property necessary for the public use and provided a fair and impartial tribunal for determining the compensation; and it would be held to be entirely violative of the constitution for the Legislature itself to fix the price. In this case we are appropriating not the reservoirs and pipes to public use, but appropriating the water itself to public use. I ask, then, why should not the determination of the compensation which is to be given for that water be a judicial question in the case at issue, just as much as it is where the power of eminent domain is to be exercised?

In the case of Van Horn's Lessee *v.* Dorrance, 2 Dallas, 304, the court, in considering the power of the Legislature with reference to eminent domain, say:

> "But admitting that the Legislature can take the real estate of A and give it to B on making compensation, the principle and reasoning upon it goes no further than to show that the Legislature are the sole and exclusive judges of the necessity of the case in which this despotic power should be called into action. It cannot, on the principles of the social alliance, or of the Constitution, be extended beyond the point of judging upon every existing case of necessity. The Legislature declare and enact that such are the public exigencies or necessities of the State as to authorize them to take the land of A and give it to B. The dictates of reason and the eternal principles of justice, as well as the sacred principles of the social contract and the Constitution, direct, and they accordingly declare and ordain that A shall receive compensation for the land. But here the Legislature must stop; they have run the full length of their authority, and can go no further; they cannot constitutionally determine upon the amount of the compensation or value of the land. Public exigencies do not require, necessity does not demand, that the Legislature should of themselves, without the participation of the proprietor or intervention of a jury, assess the value of the thing or ascertain the amount of the compensation to be paid for it."

I do not contend that this power must necessarily be exercised through the established courts of the land, or with the intervention of a jury. All that I contend is that some fair and impartial tribunal should be formed by the Legislature which should act after notice and upon inquiry.*

In Cramer *v.* The Cleveland and Pittsburg Railroad Company, 5 Ohio State Reports, 146, the court said:

> "When the public necessity requires it, private rights to property must yield to this paramount right of the sovereign power. We have repeatedly held that the character of the work for which the property is taken, and not the means or agencies employed for its construction, determines the question of power in the exercise of this right. It requires no judicial condemnation to subject private property to public uses. Like the power to tax, it resides with the legislative department to whom the delegation is made. It may be exercised directly or indirectly by that body, and it can only be restrained by the judiciary when its limits have been declared or its authority has been abused or perverted. But the Constitution has fixed an indispensable condition to its exercise. Full compensation must be made to the owner before the property can be taken. A fair and equitable mode for ascertaining the amount of this compensation, and an undoubted fund from which to pay it, must, in all cases, be provided as a necessary part of the proceeding to appropriate."

By parity of reasoning, does it not follow that where it is sought to fix the price of property affected with a public use, the function of the Legislature is exhausted in deter-

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***Eminent Domain.**

In Heyward et al. *v.* The City of New York, 7 N. Y., 324, the court say: "It is settled, by cases too numerous to need citation, that no power exists in the legislature or elsewhere to take private property without the consent of the owner for public uses, with or without compensation, except by *due process of law*, by which is meant the judgment of the law pronounced upon trial, after the matter is judicially ascertained. A man can never have his property taken from him without his consent, and given to another by mere legislation."

The assessment of damages is under judicial control. The sovereign cannot assess the damages in the case of a condemnation by himself; nor can the State, by legislation, fix the amount to be paid. (Charles River Bridge *v.* Warren Bridge, 11 Pet., 420, per McLean, J.; Van Horn's Lessee *v.* Dorrance, 2 Dall., 304; Rich *v.* Chicago, 59 Ill., 286; Langford *v.* Commissioners, 16 Minn., 375.)

The tribunal must be impartial, and may be a jury, or commission-mining the use to be a public one, and in providing a tribunal for the ascertainment of the price to be paid?

It is said that from time immemorial the power of regulating property affected with a public use, and determining the compensation for its use, has been considered a legislative power. This is so declared in Munn *v.* Illinois; but upon reference to the very statute of 3 William and Mary which is there cited, a statute passed to prevent extortion on the part of wagoners and carriers, it appears that although Parliament provided by statute for the regulation of this use, yet it did not fix the compensation, but submitted this portion of the power of regulation to a judicial body—the justices of the peace of the various counties. So also, under the existing legislation of Parliament, the power of fixing the compensation of common carriers is submitted to a judicial tribunal—the railway commissioners. And in regulating the use of land in Ireland, Parliament has exercised the legislative power of declaring the public exigency which warrants the regulation, but has submitted the question of the compensation, the rents, to an impartial judicial tribunal—the Land Court. I find also, upon going over the early legislation of the various States, with refer-

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ers, or court without a jury. (Ames *v.* Lake Superior R. R., 21 Minn., 241.)

The corporation condemning cannot be invested with the office of assessing damages or benefits, because that must be done by an impartial tribunal. (Hessler *v.* Drainage Commissioners, 53 Ill., 105.)

The cases of Cox & Hill *v.* Cummings, 33 Georgia, 549, and Cummings *v.* Campbell, 33 Georgia, 625, are in point. In these cases the so-called impressment acts of the Confederate Congress were under discussion. They provided for the taking of private property, sugars, groceries, and other things, by the officers of the army at prices fixed by schedule. There the Government sought to compel the owners of private property to deliver it to the officers of the Government for public use upon the payment of a price fixed by itself, just as in this case the State has sought to compel the owners of water to deliver it to the pubiic at a price fixed by a legislative body. The court in those cases held that the impressment acts were void, because they did not provide for prompt and just compensation, and did not provide for the selection of fair and impartial appraisers.

I also refer to the case of N. P. Langford et al. *v.* County Commissioners of Ramsey County, 16 Minn., 333. I quote from the syllabus, as it contains a correct statement of the decision:

ence to the fixing of the rates of roads, inns, and ferries, that the rates have been often submitted to judicial tribunals, the county courts, &c.; and of late years the practice has been to submit the fixing of the compensation of common carriers to railway commissioners, who act as a court, after notice and upon proofs.

Now, assuming that Parliament possesses not only legislative but judicial powers, and assuming, as I do not think the facts warrant, that its general course of legislation has been to fix the compensation itself by statute, I ask whether it is not fair to conclude that the fixing of compensation by Parliament, inherently judicial in its nature, was in the exercise of its judicial power, and not of its legislative power ?

How can we assert that simply because the power was exercised by Parliament it was necessarily legislative in its character ? All its acts would take the form of legislative acts, statutes, and yet they might be inherently judicial or legislative, according to the nature of the case.

The power of government possessed by Parliament has been by our constitutions, Federal and State, divided into three departments—the executive, the legislative, and the judicial—all co-ordinate and co-equal; but in the process of

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"Eminent domain.—Constitutional law.—The mode of determining the compensation to be paid for taking private property for public use is in the discretion of the Legislature, with certain constitutional limitations.

"Same.—The Legislature must provide an impartial tribunal to ascertain the compensation before which both parties may meet and discuss their claims on equal terms.

In Hessler *v.* Drainage Commissioners, 53 Illinois, p. 114, the court say : "A just compensation for the property taken is made by the Constitution an indispensable requisite to the exercise of this power, and what shall be a just compensation can be determined only by some impartial agency."

In Bonaparte *v.* Camden and Amboy Railroad Company, 1 Baldwin's U. S. Circuit Court Reports, p. 222, the court say: "In this case the right to take and the right to compensation are admitted. The only question is the amount, which may be submitted to any impartial tribunal the Legislature might designate." (See also Cramer *v.* Cleveland, 5 Ohio State, 140; Simmons *v.* Cincinnati, 14 Ohio, 174; Kent's Commentaries, vol. 2, p. 3399; Ames *v.* Lake Superior Railroad, 2 Minn., 24; Langford *v.* Commissioners, 16 Minn., 375; Powthe development of the powers of these departments the judiciary has by its own decisions, and by the common consent of the nation, become the final arbiter. It sits in judgment, not only pursuant to the common law and under statutes passed by Congress or by the different States, but sits in judgment upon the statutes themselves. Where was such a power ever before exercised? Certainly not in England. The whole judicial history of England does not furnish an instance where a court of that country declared an act of Parliament unconstitutional, however violative it might have been of the principles of their so-called constitution, or of natural right and justice.

If, then, for the first time in the history of any government, the judiciary was in this country made a co-ordinate branch of the government, is it strange that in the early legislation of this country the courts and the legislatures should not always have drawn the distinction between legislative and judicial powers, and is the course of the legislation on this subject in the early history of our country, even though it uniformly went to the extent claimed, (which I do not admit,) to have the effect of denying to judicial tribunals jurisdiction in matters inherently judicial, and of limiting

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ers *v.* Bear, 12 Wis., 214, and other cases cited in Mills on Eminent Domain, sec. 85.)

In Horton *v.* The Squankum and Freehold Marl Company, U. S. Circuit Court of New Jersey, 17 American Law Register, new series, the court say: "What is such a public use as will justify the taking of private property is also a question which the Legislature must in the first instance determine; but upon this point their determination, although entitled to respectful consideration, is not final and conclusive."

So that it would seem that in a United States court it has been held that the finding of the Legislature as to the necessity of the property for the public use is only *prima facie* conclusive, and that the courts can, if they come to a contrary conclusion, set aside such legislative declaration. Under the exercise, then, of the power of eminent domain, it is necessary to find two facts—namely, that the property is necessary for the public use and what is a just compensation. Some of the courts have held that both of these facts must be inquired into judicially. Others have held that the first can be determined by the Legislature, but that the last must always be determined by the judiciary.

the power of the judicial department of the government? Is the judiciary to deny its own power simply because the legislature has in times gone by usurped it?

Determining the compensation between the seller and the buyer, whether in the case of eminent domain or in the case of regulating public use, is a matter of proof, requiring notice, an opportunity to be heard, and a fair, impartial tribunal.

It seems to me that the construction of the Federal limitations in question, for which I contend, will secure to the State ample and complete control over all property affected with a public use. It does not deny in any way the power of the government to regulate the use. Whenever the State becomes convinced that so large a portion of the community is affected by the use of a particular property that it is justified in declaring such use a public use, it has the right to control it. But how? It can by legislative act or constitutional provision declare the use to be public; it can declare that the rates of compensation for such use shall be equal and uniform; it can prescribe rules with reference to a just exercise of the use; it can organize a fair tribunal for ascertaining the compensation for the service or commodity. But here, as declared in Van Horne's Lessee *v.* Dorrance, already quoted, with reference to the eminent domain, "the Legislature must stop. They have run the full length of their authority, and can go no further; they cannot constitutionally determine upon the amount of the compensation. * * * Public exigencies do not require that the Legislature should of themselves, without the participation of the proprietor or intervention of a jury,* assess the value of the thing, or ascertain the amount of the compensation to be paid for it."

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*Since the case referred to was decided, the courts have held that "due process of law" does not necessarily require the intervention of a jury in fixing the compensation for property taken for public use. The compensation may be fixed by a court or a jury or by commissioners, but the tribunal must be fair and impartial, and proceed judicially.

There is no magic in the word "just" which would imply a judicial inquiry any more than there is in the word "reasonable." If the use of the word "just" in connection with the word "compensation," as used in the limitation respecting the eminent domain, implies that the courts are to determine the compensation, certainly the use of the word "reasonable" in connection with the word "compensation," as used in the regulation of public uses, would indicate that the courts are to determine the same question. The limit of the control of the government with reference to property affected with a public use, has been, that in the absence of any statute or any specific mode of regulating that use, the courts were always to determine what is reasonable compensation; and I say that the Legislature has exhausted its functions when it declares the use to be a public one and provides a fair and impartial tribunal for determining the compensation to be allowed therefor.

Mr. Justice **FIELD**: Your argument is that because you are deprived of the right of naming a portion of the board to fix the compensation, that is taking the property in the sense of taking it for the public use?

Mr. **NEWLANDS**: No, your Honor; in my discussion I leave entirely out of the question the provision in the act of 1858 with reference to determining the compensation by a system of arbitration. I assume that the statute of 1858 contains no stipulation respecting this; that this corporation is supplying San Francisco and its inhabitants with a commodity, water, or is rendering service, whichever term is preferred, and that this business has become of sufficient importance to the community at large to justify the Government in regulating it, and I claim that, as a necessary and essential portion of such regulation, it must submit the question of compensation to some kind of a fair and impartial tribunal, judicial in its nature, and that such tribunal need not necessarily be the established courts, but may be a special tribunal, such as the railroad commissioners of the various States, which will proceed not according to legislative methods, but according to judicial methods, and under those guards which experience has provided for rendering justice as between man and man, the individual and the State.

Mr. Justice HARLAN: How would it affect your argument if it was conceded that the charges allowed originally were unreasonable?

Mr. NEWLANDS: I think it would have no effect whatever, for I am simply now considering a question of power as to whether either the constitution or statute of a State can give to a legislative body, a political body, the right to determine the compensation which shall be received by the owner of a commodity, or which shall be received by one who renders service; and I claim that inasmuch as the courts have given a liberal interpretation to the limitation with regard to the exercise of the power of eminent domain, and have determined that the just compensation in the one case must be determined by a fair and impartial tribunal, though there is nothing expressly in the Constitution which so declares, they should give the same protection where it is sought to regulate a public use, and where that regulation involves the determination of the compensation for a commodity or for services.

But it is claimed that this power, by which the entire property and business of this company are subjected to the will of its customers, is a portion of the *police power* of the States. There is nothing in the term itself which indicates its meaning, and we have to inquire into the object of government to ascertain its meaning. As I understand it, the object of government is to secure to man life, liberty, and the pursuit of happiness. Every man surrenders to society a portion of that liberty which he would enjoy in a state of nature, in return for the protection which society affords; and society, acting in the aggregate through its government, controls the individual, his life, liberty and property; and this power of society, absolute unless limited by society itself, is called the *Police power*. The question is whether we have any limitations on that power in our form of government. In England they have none. As I have already stated, the power of Parliament is omnipotent. In it are aggregated all the powers of society. But the limitation which there exists in favor of the individual and against the power of society represented in the government, is that one house of the English Parliament—the House of Lords—is a privileged body, consisting of large owners of property; a body by its very nature disposed to protect property, because its members are most interested in its conservation. The framers of our Constitution, having determined to establish a Republic in which no privileged body should exist, recognized the principle of political economy that it is instinctive in man to acquire, and that this instinct, properly guarded, could be made a force in the promotion of good government and in the advancement of civilization; and consequently they determined to put society itself in bonds; and this they did by these limitations upon the powers of Congress and the powers of the States contained in the Federal Constitution, in which they declared that no State should impair the obligation of a contract, or pass bills of attainder; and that no person should be deprived of life, liberty or property without due process of law; and finally, in the fourteenth amendment it was provided that no State shall deprive any person of his life, liberty or property without due process of law.

These powers of government were divided into three branches—the legislative, the judicial, and the executive. The judiciary was given a prominence which it never had before under any form of government. Of necessity it became the final arbiter not only as to its own powers, but as to all the powers of the co-ordinate departments. In England it was the mere creature of Parliament, organized by it. The courts could be abolished by Parliament, and it could at any time assume the entire judicial power of the nation. And so, I say, we can never ascertain what is judicial in its nature by referring to the course of Parliament in its legislation, for that legislation covered everything—executive, judicial, as well as legislative; and I claim that there is not an outrage upon private right or upon personal liberty which will not find its sanction in either the judicial or the legislative history of England. To ascertain the meaning of the fourteenth amendment, the meaning of the words "due process of law," by the light of what King John thought to be "the law of the land," or by what the barons thought to be "the law of the land," or by what Parliament deemed to be the law of the land, or by what was thought to be the law of the land in England when America separated itself from the mother country, is to read by the light of a tallow dip when the electric light is at hand. It ignores the fact that the science of government, like all other sciences, is progressive; that there is evolution in government as there is in physical and vegetable life, and involves as irrational a conclusion as to declare that the man of to-day, endowed with a soul, possessed of rational faculties, hope, sympathies, and aspirations, is identical with his progenitor, Darwin's pre-historic man.

With the advancement of civilization and progress even words grow and attain a deeper and wider significance. The words of the fourteenth amendment should be adapted to the growth of advanced ideas of government, should receive as expansive an interpretation as the language employed will permit, and should be applied not only to the real or conjectural cases which were in the minds of the framers of the Constitution, but to every private right which in the judgment of an enlightened judiciary ought to receive the protection of judicial inquiry and decision.

Pardon me for another word upon a question propounded to my associate by Mr. Justice Miller as to the reserved power. Your Honors will observe that the act of 1858 contains two classes of clauses: one, grants from the State, and the other, grants from the corporation organized under the act. The act of 1853 consists, I believe, entirely of franchises and privileges granted by the State. The act of 1858 consists partly of such privileges and franchises and partly of stipulations upon the part of the corporation affecting what would otherwise be its property rights. In the first class is the provision that the company shall have the right to exercise the power of eminent domain contained in section 2; the provision contained in section 3, that all companies organized under the act should have the privileges, immunities, and franchises which might thereafter be granted to any individual or corporation for supplying water to San Francisco; the provision contained in section 5 giving power to the company to lay its pipes in the streets. All these are grants from the State. These are subject to the reserved power. I claim that the reserved power only applies to that which the State confers. It may take away the power of eminent domain; it may take away the right to lay down pipes in the streets, but not so as to affect the pipes already laid, for the company has vested rights in its pipes as laid.

Now we come to the stipulations on the part of the corporation itself. It agrees in section 2 that all reservoirs, canals, ditches, pipes, aqueducts, &c., acquired by it shall be used exclusively for the purpose of supplying San Francisco with water. That is not a grant from the State; that is not a franchise or privilege; it is simply a limitation voluntarily made by the corporation itself, when it organized under the act, with reference to its dominion and control over all property it acquired under the act, a limitation that all its property shall be used for this particular purpose. That stipulation cannot be charged under the reserved power. The State cannot provide that all the company's reservoirs, canals, ditches, pipes, aqueducts, &c., shall be used for the purpose of supplying salt water instead of fresh water, or that its pipes shall be used for supplying gas or oil. The company has limited its control over its own property by its voluntary stipulation, and any change of that stipulation on the part of the State is a deprivation of a vested right.

So also with reference to section 4. The company has agreed that it will forever furnish pure fresh water to the inhabitants for family uses, so long as the supply permits. The State cannot change that, and provide that it shall furnish salt water, or oil, or milk, or soda water, or beer, or wine for family uses. So also the company has property in its water, so determined in the case of Heyneman *vs.* Blake. Your Honors will recollect that I read a quotation from that decision, which declares that water stored in reservoirs and conducted in pipes is property, a subject of commerce, a commodity to be sold just as any other commodity is by corporations organized under the law of 1853, commercial or business corporations, ice companies, or gas companies, &c.

The company then has this property. As an incident, an attribute of that property, it has the *jus disponendi*, the right to dispose of it, and the right implied in that to bargain as to the compensation, and not to surrender it unless the compensation it fixes is acceded to. The company voluntarily limited that right of property by its agreement and stipulation, by declaring and agreeing that the value of that property shall be fixed by arbitration. It thus limited by its voluntary act its *jus disponendi*. That is a contract also, a stipulation emanating from the corporation, not from the State, but from the corporation, which the State cannot change without impairing the obligation of a contract and depriving the company of its vested rights.

So then I claim that the reserved power can be exercised by the State only to the extent of these privileges, immunities, and franchises which have been conferred by the State, and that it has no power whatever to change any stipulation or agreement on the part of the corporation itself limiting its control over the property which it owns. This construction is entirely consistent with the decisions of the courts, which have uniformly held that the power must be exercised reasonably and not oppresively, in good faith, and consistently with the object of the corporation.*

In Allen *v.* McKean, Mr. Justice Story, who is the author of the doctrine of the reserved power, declared that the statute of Maine——

Mr. Justice Gray: Where do you find that Justice Story was the author of that doctrine?

Mr. Newlands: My recollection is that in his opinion in the Dartmouth College case he claimed that the power of changing grants by the State could not be exercised unless

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***Reserved Power.**

Shields *v.* Ohio, 5 Otto, P. 324; Commonwealth *v.* Essex, 13 Gray, (Mass.,) 239; Allen *v.* McKean, 1 Summer, 277; Sage *v.* Dillard, 15 B. Monroe, (Ky.,) 353.

Under the new constitution of California, a statute was passed forbidding the employment of Chinese by corporations. *The Parrott* case came up in the Circuit Court, Judges Sawyer and Hoffman presiding, testing the validity of this statute. The counsel for the State contended that it was a valid exercise of the reserved power over the charters of corporations. In his decision, Hoffman, U. S. district judge, says:

"When we consider the vast number of corporations which have been formed under the laws of this State, the claim thus put forth is well fitted to startle and alarm. It amounts in effect to a declaration that the corporations formed under the laws of this State and their stockholders hold their property, so far as its beneficial use and enjoyment are concerned, at the mercy of the legislature, and that rights which in the case of private individuals would be inviolable have for them no existence.

"The adjudged cases, though they contain no precise definition of the extent and limits of this power applicable to all questions which may arise, are nevertheless full of instruction on the subject." * * *

"That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or deprive the corporation of the fruits actually reduced to possession of contracts lawfully made; but, as was said by this court, through Mr. Justice Clifford, in Miller *v.* The State, the power was reserved. My recollection of the history of the country is, that from that as a starting point sprang those constitutional provisions of the various States which declare that corporations shall be formed under general law, but shall be subject to alteration, amendment, or repeal.

Mr. Justice **Miller**: He referred, in that opinion, to a previous decision of the Supreme Court of Massachusetts stating the same doctrine.

Mr. **Newlands**: In the case of Allen *vs.* McKean, where the statute passed by the Legislature of Maine changed the trustees of Bowdoin College, which was organized under a

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15 Wall., 498, 'it may safely be affirmed that the reserved power may be exercised to almost any extent to carry into effect the original purposes of the grant, or to protect the rights of stockholders and of creditors, and for the proper disposition of its assets;' and again, in Holyoke Company *v.* Lyman, id., 519, 'to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of a corporation.'" * * *

"It is not merely the title to the property that is protected from legislative confiscation, but that which gives value to all property, the right to its lawful use and enjoyment.

"It would be a mockery, a delusion, and a snare to say to a corporation: the title to the property you have lawfully acquired we may not disturb, but we may prescribe such condition as to its use as will utterly destroy its beneficial value. It need hardly be said that no reference is here intended to the power of the State to enact police laws, that is, laws to promote the health, safety, and morals of the public. To such laws corporations are amenable to the same extent as natural persons, and no further. The law in question does not affect to be a police law. Its validity, if applied to natural persons, was not contended for at the bar. The authority to pass it was sought to be derived exclusively from the reserved power over corporations. It forbids the employment of Chinese."

"Such an exercise of the legislative power can only be maintained on the ground that stockholders of corporations have no rights which the Legislature is bound to respect. Behind the artificial or ideal being created by the statute and called a corporation are the corporators—natural persons who have conveyed their property to the corporation, or have contributed to it their money and received as evidence of their interest shares in its capital stock."

"I am, therefore, of opinion that, irrespective of the rights secured to the Chinese by the treaty, the law is void, as not being a 'reasonable,' *bona fide*, or constitutional exercise of the power to alter and amend the general laws under which corporations in this State have been formed."

statute containing the reserved power, it was held that the amendment was unreasonable and was not within the limits of the reserved power; and in a case in Kentucky, where a similar attempt was made to change the trustees of a theological institute, the State adding fifteen to the number, and naming the trustees themselves, it was held that the amendment was unreasonable and oppressive, that the power did not warrant the taking of property from the hands of the corporators and giving it to others. Yet your Honors will observe that in these cases the power of the corporators to hold property through trustees, or rather the right to have trustees at all, was a franchise emanating from the State, and yet in those cases the courts held that the power was unreasonably exercised, and that the statute making the change impaired the obligation of the contract.*

I have taken the liberty, with the consent of opposing counsel, to add a few thoughts which the expiration of the time alloted to me at the oral argument prevented me from presenting.

I have thus far considered the construction and application of the 14th Amendment on principle and authority, with only a passing reference to the doctrine declared in Munn *v.* Illinois. I contend that there is a clear distinction between the facts of the two cases. It is true that in each case the business affects the community at large, and that in each case the people in framing the constitutions of the respective States deemed the public exigencies such as to necessitate the declaration that the business was a public use. But here the resemblence ends. In Munn *v.* Illinois the regulation was as to the charge which the owner of the warehouse should make to those who used it; the owner retaining the title and possession of the property. In this case the compensation for the property itself, the commodity in which the company deals, is fixed by the political agents of the buyers and the business agent of the municipality, the largest buyer, without the participation of the owner of the property. In Munn *v.* Illinois the owner of the elevator could at any time relieve himself of the regulation by discontinuing the use. In this case the company is obliged by the express terms of its charter to use its reservoirs and other property exclusively for the supply of San Francisco with water, and to continue furnishing water so long as the supply permits. In Munn *v.* Illinois the court decided that the property o the owner of the warehouse was not *taken* for the reason that the title and possession remained in him, and that no right of property was invaded because the owner could at any time discontinue the use. In this case the company is compelled to deliver the property, and the property is taken by the public at a price fixed substantially by itself.

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*Here the oral argument of Mr. Newlands ended.

But even if there is no distinction between the cases, I still contend that the power of the government, called the police power, should be exercised according to the recognized principle of our government, giving to each department thereof its proper sphere of action. Recognizing the power of the public to regulate the use of property which affects the public generally, I claim that such portion of this power as is legislative in its nature should be exercised by the Legislature, and that such portion of this power as is judicial in its nature should be exercised by a judicial tribunal. Regulation in this case involves the determination of two questions: First, the public exigency which requires that this property shall be charged with a public use, and, second, the fixing of the compensation for that use. The first is legislative in its nature; the second is judicial. No one can contend that the fixing of the compensation for property taken involves the exercise of judicial power in any greater degree than the fixing of the compensation of property used. The parties whose interests are to be affected should be heard;

notice of the proceeding should be given, proofs should be taken, and judgment should be rendered.

Admitting, then, the power of the government—which consists, it must be recollected, not only of the legislative but also of judicial and executive departments—can be exercised so as to regulate the use of property charged with a public use and to fix the compensation therefor, I claim that the power of the legislative department of the Government is exhausted when it declares the public exigency, declares the use is a public one, and provides a fair and impartial tribunal, proceeding according to the established modes of judicial inquiry, to fix the compensation. This view coincides entirely with the power of the State; it only limits the power of the Legislature when the private right is to be invaded, and places that private right, as the constitution requires that it should be, under the protection of the judiciary. The power of eminent domain is a branch of the police power or the power of government. So also is the power to regulate property affected with a public use, and to fix the compensation for such use. The eminent domain includes the power to take property when the public exigency demands, and to fix a just compensation. The power to regulate public uses includes the power to declare the use to be public when the exigency requires it, and the power to fix a compensation for such use. The power to declare the exigency and to frame the tribunal for fixing the compensation is entrusted to the Legislature, with the sole limitation that the tribunal must be in its nature fair and impartial. The power of fixing the compensation itself is judicial. The nature of the power exercised, whether in taking property for the public use, or taking the use of property for the public use, is in both cases the same. It is true that in this case the constitution and not a legislative statute purports to regulate the use and to provide a tribunal for fixing the compensation. But this makes no difference; what the

Legislature of a State cannot do, the people of such State cannot do by constitutional enactment, where the power exercised falls within the prohibitions of the Federal Constitution.

If the constitution of California were to declare that private property should not be taken for public use without just compensation, and should also declare that the Legislature should fix the compensation for property taken for the use of the city, and that the board of supervisors should fix the compensation for the property taken for the municipality, and that corporations to whom the power of eminent domain was delegated should have the power of fixing the compensation for property appropriated by them for the public use, the courts would as unhesitatingly declare such constitutional provision to be violative of the Federal Constitution as they would a statute containing similar provisions. The United States is bound to secure to every State a republican form of government. Such government implies its division into three departments—the executive, judicial, and legislative. And the constitution of a State which would repose all the powers of the government in the hands of public mass-meetings, or in the hands of but one body representing the people which would be the repository of unrestrained power, legislative, executive, and judicial, would certainly be held to be violative of the Federal Constitution.

I submit that the system of regulation of public uses which leaves to the Legislature the duty of determining the necessity for such regulation, and the framing of a body or an impartial tribunal for determining the compensation for the use, is a much more rational system than that which leaves the entire matter to the legislative department. There is no public exigency which demands that the power of fixing the compensation for the use should be determined in any other manner than in the case of the eminent domain. If the one is judicial, the other is judicial. The use is an essential element of the property. The compensation for the use should be determined judicially as well as the compensation for the property itself. If the Federal Constitution requires that the property shall be taken by due process of law, it requires that the use shall be taken by due process of law. How is it possible to escape this course of reasoning? In this way the menacing dangers of corporations and aggregated wealth disappear before the combined powers of the legislative and judicial departments; the public exigency is met; justice is done to the public and is done to the individual owner of the property affected; the power of the government is exercised; the right of the individual is preserved.

The alternative suggested in Munn *v.* Illinois, that if the party is dissatisfied with the regulation he can discontinue the use, is a dread one. Property is valuable only in connection with the uses to which it is put. Land which is valuable in a city for building purposes might be valueless for agricultural purposes. Suppose a Legislature should declare the rental of lands and buildings in San Francisco to be a public use, and should provide that the supervisors should fix the rents of a block of houses built for rental. The owner would be compelled to discontinue the use in order to avoid the regulation. He could not occupy them all himself; the buildings would be entirely unsuited for any other purpose. Is he to let the land and property lie unoccupied and neglected, or is he to destroy his buildings and plant corn and wheat? And then suppose the Legislature should declare the sale of wheat to be a public use, where will his efforts to escape the regulation end?

The property of this company is almost valueless for any other purpose than that to which it is at present appropriated. Large tracts of land have been given immense value by the construction of costly dams and the storage of water thereon; miles of pipe have been laid. The value would not be entirely destroyed if the use were discontinued, but it would be so materially impaired as to fall little short of destruction. It is a cruel alternative to say you must submit to the will of the buyers, or you must discontinue the use. There is no liberality or justice in telling a man that he can either starve or commit felo de se. There is little choice between torturing a man to death by slow processes and killing him immediately; he can hardly be grateful for the choice of the alternatives.

It is admitted in Munn *v.* Illinois that the power is likely to be abused, and for the remedy for all legislative abuses the persons injured are referred to the polls. I can imagine the four or five hundred stockholders of the Spring Valley Water Works—men, women, and children—going to the polls for their remedy against forty thousand voters, half of them foreign-born, all of them with a direct pecuniary interest opposed to the stockholders.

The optimist will say that the people always wish to act justly. I am no pessimist, but I insist that he reads history wrong who makes this declaration. History teaches that men individually and in the aggregate have been groping their way toward the light; the general line of their progress has been towards it, but devious have been the by-ways and numerous the pitfalls of license, passion, and prejudice. The true statesman, publicist, and jurist is he who trusts not so much to the inclinations for good in man as he who guards against his frailties and errors.

There has been a tendency in every government toward despotism of some kind. The English-speaking people have had their single despot—the king. They have had their privileged despots—the barons and nobility. The power of each has been curbed. The despot of the future will be the majority, a despot more cruel because unrestrained by considerations of safety or fear, its members bound together by an undefinable sympathy which pervades them all and excites their minds to deeds of injustice and cruelty, from which as individuals they would shrink. This is the power which we have to dread in this country.[*]

Members of the judiciary engaged in occupations largely scholastic, having little to do with politics, can form but slight conception of the terrible nature of the power which has been asserted in Munn *v.* Illinois. National politics are bad enough; State politics are worse; municipal politics are worse still; and this corporation has been subjected to the worst form of legislative control. Bands of good citizens have been formed in nearly all of the large cities with a view to securing protection in matters of general public interest, such as the incurring of a municipal debt, or levying municipal taxation, or extension of municipal improvements. They have thus far failed. The large cities are controlled as a rule by a foreign vote, and this vote is largely under the control of the demagogues or bosses, so called, whose only interest in politics is corrupt. The only protection against municipal mismanagement, which intelligent men have been enabled thus far to secure, has been to prevent by constitutional enactment the incurring of municipal debt, to limit the rate of municipal taxation, and to declare void any expenses beyond the income of the current year. Thus the public, distrusting their agents and servants, have sought by organic law to guard the public treasury and to protect the public funds from their attacks. They double and treble the guards of the treasury, and yet they submit the property of this corporation unreservedly to the control of the very men whom they suspect and distrust. They protect the public moneys and the public property from spoliation by the public agents, but they surrender the private property of this corporation to be plundered and destroyed.

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[*] Story, in his work on Constitutional Limitations, sec. 1,790, says: "Indeed, in a free government, almost all other rights would become almost worthless if the government possessed an uncontrollable power over the private fortunes of their citizens. One of the fundamental objects of every good government must be the due administration of justice, and how vain it would be to speak of such an administration when all property is subject to the will and caprice of the legislature and the ruler."

And again, sec. 1,780: "The sympathies of all mankind are enlisted against the revenge and fury of a single despot, and every attempt will be made to screen his victims; but how difficult it is to escape from the vengeance of an indignant people, aroused to hatred by calumnies, or stimulated to cruelty by bitter political enemies or unmeasured jealousies. An appeal for safety can, under such circumstances, scarcely be made in any other manner than by the severe control of courts of justice."

In Wilkinson *v.* Leland, 2d Peters, p. 657, the court says: "That government can scarcely be called free, where the rights of property are left solely dependent upon the will of the legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred."

It should be remembered that the power exercised in this case is not entrusted to the Legislature of the State, a co-ordinate department of the Government, drawn from the people of the whole State, and less likely, therefore, to be affected by the passion, or the prejudice, or the interest which might exist in a particular locality, but by an inferior legislative body, representing only a particular locality and a constituency made up of the customers of this company, a body easily controlled by the prevailing interest or passion or prejudice.

The municipal history of San Francisco on the water question would be instructive if it had any place in the record of this case. It may not be, however, improper to allude to an adjudged case* in the Circuit Court of Cali-

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* In February, 1883, an action was brought in the U. S. Circuit Court of California, by the Spring Valley Water Works against the Mayor and Board of Supervisors of San Francisco, to enjoin them from finally passing a certain ordinance which had been reported by the water committee of the board, and had been passed to print—

On motion for a preliminary injunction the court denied the application, principally upon the ground that the question of the right of the supervisors to act was then pending in this court. [The present case.]

I quote from the opinion of Mr. Justice Sawyer in Spring Valley Water Works *v.* Washington Bartlett, etc., et al., Pacific Coast Law fornia, in which the plaintiff in error here was the plaintiff, as instructive of the nature of the power here exercised. It appeared there that the mayor and supervisors before election had pledged themselves to material reductions in the rates, which the company claimed would be almost destructive of its income. Circuit Judge Sawyer, with reference to this, says: "If it be competent at all under the provisions in question for the people of San Francisco, through their representatives in the board of supervisors, to pass the proposed ordinance, it is difficult to perceive why, in looking around for agents or representatives to carry out their will, it is unlawful to ask in advance whether those seeking to represent them will obey their command in these particulars, or to require a pledge to that effect before committing the trust to them." Here, then, appears the evil of treating this power of fixing the compensation as a legislative one. If the members of a legislative body can fix the compensation, it is competent for their constituents to instruct them what compensation to fix, and to refuse to elect them unless they will pledge themselves to carry out such instructions. The result,

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Journal, March, 1883, as it is instructive with reference to the confiscatory nature of the provision in question:

"By the provision of the State constitution in question, adopted after the complainant had expended large amounts of money in executing the contract, and its rights, whatever they were, became vested, it was provided that the rates of compensation to be collected for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, 'shall be fixed annually by the board of supervisors * * * of such city and county.' And it was further provided, that 'any person, company, or corporation collecting water rates in any city and county, or city or town, in this State, otherwise than as so established, shall forfeit the franchise and water-works of such person, company, or corporation to the city and county, or city or town, where the same are collected, for the public use.' It would seem to be only necessary to make this brief statement of the case to enable one of ordinary intelligence, endowed with a reasonable share of moral sense, to perceive the monstrous injustice of thus placing the large investments of complainant, made under the stimulus of the inducement held out by the act of 1858, at the absolute mercy of an irresponsible public sentiment, or of public cupidity. This last provision would seem to offer a large premium for the per-then, is that the people themselves—the customers of this company—by a popular vote, determine what they shall pay for the water. If the power were intrusted to a judicial tribunal no pledges would be exacted, and if they were given they would disqualify the members of such a tribunal. If a judge has an interest in a cause it unseats him, for the reason that such interest deprives him of all judicial capacity, and he cannot exercise the judicial function. So the courts have always held. The same reasoning would apply to the case of a judge who would pledge himself as to his judicial action; it would deprive him of all judicial capacity—of the ability to act at all; and doubtless the court would do as it did in the quaint old English case with reference to a judge who sat in his own cause—"lay him by the heels."*

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petration of a wrong—a large inducement to the purchaser (the consumer) to fix the price at unremunerative rates, in order to secure the large property by forfeiture and confiscation, or to so largely diminish its value as to force a sale to the city at a price far below its real value. It was alleged in the argument, and not denied, to be a matter of public history and public notoriety, of which we are authorized to take notice, that such designs have been openly and publicly avowed and advocated by public speakers."

"It is no answer, sound in morals or honest in a business point of view, whatever it may be in law, to the wrong complained of by the complainant, that if it does not like the conditions of its future existence imposed upon it by article XIV of the State constitution, it can withdraw from this field of enterprise. It cannot withdraw without a sacrifice of its large investments, nor can it suspend its operations for a single day without inflicting untold misery upon a large population, and it might involve the destruction of the city. Its investment is useful and valuable for no other purpose than to supply water for the use of the people of San Francisco. To fix the price at unremunerative rates is to confiscate the property."

*It is an elementary principle of natural justice that no man shall be a judge in his own case—and yet those adversely interested are authorized by this change to sit in judgment on the rights, property and revenue of this company. In the case of *King* v. *The Inhabitants of Yarpole*, 4 Term R., p. 71, the rule was laid down that on an appeal to the Sessions against an order of removal, those Justices who were rated to the relief of the poor in either of the contending Parishes could not vote. (See, also, *King* v. *Gudridge*, 5 Barn & C., p. 459.)

In *City of London* v. *Wood*, 12 Modern, p. 669, Lord Holt said: "I agree that where the city of London claims any freedom or franchise to itself then none of London shall be judge or jury, for there they claim an interest to themselves against the rest of mankind. * * The

It is a common remark that the menacing danger of the republic is the power of corporations and of aggregated wealth. I do not underestimate this power. It has threatened to control our institutions and to destroy the life of the State. To-day it controls much of the legislative action of our various States; but this power, which is often exercised by a few men through the various corporate methods of combination, is being gradually curbed and limited by the steady pressure of the courts of justice. Decisions have been made and are being made every day which uphold the powers and rights of the stockholders as against improvident and dishonest trustees; which set aside contracts made by such trustees with themselves; which disrupt corrupt combinations between corporations, made with a view to plundering the public or the stockholders. These decisions are gradually restricting the area of corporate mismanagement, and are instructing the minds and the consciences of those connected with corporate affairs. In the administration of justice by upright courts, and in general legislation adopted with a view not to the extinction of the rights of property or of

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judge is agent, the party is patient, and the same person cannot be both agent and patient in the same thing, but it is the same thing to say that the same party may be patient and agent in the same thing, as to say that he may be judge and party—and it is manifest contradiction."

*In Hall *v.* Thayer, 105 Mass., 221, the court, in considering the judicial qualifications, declares: "The provisions of Art. 29 of our Declaration of Rights, that 'it is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit, rests upon a principle so obviously just and so necessary for the protection of society against injustice, that no argument is necessary to sustain it, but it must be accepted as an elementary truth. The impartiality which it requires incapacitates one to act as a judge in a matter in which he has any pecuniary interest, or in which a near relative or connection is one of the parties. It applies to civil as well as criminal cases, not only to judges of courts of common law and equity and probate, but to special tribunals, and to persons authorized on a special occasion to decide between parties in respect to their rights. It existed under the common law from the earliest times."

As to impartiality required of arbitrators, see Morse on Arbitration; Strong *v.* Strong, 9 Cush., 560.

corporate rights, but with a view to correcting the evils of the administration of corporations, will be found a gradual remedy for these evils. This danger will be short-lived, but the despotism of the majority, aroused to fury by the appeals of incendiaries and demagogues, or perhaps by mismanagement and extortion, is much more to be dreaded. The people move slowly, but when once in motion they move with terrible force. The power which is given them by the doctrine declared in the case of Munn *v.* Illinois, unrestrained by the judiciary, will eventually subject almost all the property in the country to the tyranny of the majority and the violence of the legislators who represent it. The prohibitions of the Federal Constitution are sufficient to protect the property which does not tempt the cupidity of the public to such a degree as to induce it to charge it with a public use. The communism of the future will not take the form of spoliation of individual right, but will take the form of discriminating taxes and the regulation of public uses. Between the upper and nether millstone, all property generally useful will be ground.

I close this discussion with a statement of my propositions—

1st. That water is property.

2d. That the plaintiff in error is, by article XIV of the new constitution, taken in connection with the obligation imposed by the act of 1858, that all its reservoirs, pipes, &c., shall be exclusively used for supplying water to San Francisco, and its further obligation to furnish water so long as the supply permits, deprived of its property; that to compel the vendor to sell property at a price fixed by the vendees or their agents is to deprive him of his property.

3d. That this is done without due process of law; that process of law implies parties, an impartial tribunal, an opportunity to be heard.

4th. That "due process of law" is not synonymous with "law of the land" as used in Magna Charta, or in English judicial or legislative history, and that such history furnishes no guide for determining its meaning.

5th. That in this country the judiciary is a co-ordinate department of the Government, and that no State constitution or statute can be regarded as consistent with the Federal Constitution, or with a republican form of government, which does not recognize the co-ordination of these powers and the separate sphere of each.

6th. That the power to condemn for the public use and the power to regulate for the public uses are both branches of the police power, or the power of government; that both are inherent in the State, like the power to tax. That as "due process of law," apart from any other limitation, would require the compensation for property taken for public use to be just and to be ascertained by a fair and impartial tribunal, judicial in its composition and nature, so also the "due process of law," apart from any other limitation, would require the compensation for property charged with a public use to be reasonable, to be ascertained in the same way. That as in the condemnation of property the owner is deprived of the property at a price fixed otherwise than by himself, so also in the regulation of the use, the owner is deprived of the use or of the property itself, if the use consists in its consumption, at a price fixed otherwise than by himself. If the fixing of the compensation is a judicial question in the one case, it is in the other.

7th. That the privilege of discontinuing the use makes no difference. To continue the use at the price fixed by the vendee, or to divert the property from a use to which it alone is adapted, is equally destructive of all that makes property valuable.

8th. That in this case the plaintiff in error cannot, under the law of its creation and by the force of which it exists, discontinue the use.

9th. That the theory contended for does not deny the power of the State to control public uses; on the contrary, it gives to the State, through the legislative body, the right to declare the urgency, and to charge the property with the use; to provide for equality of service upon the part of the proprietor, and equality of right on the part of the patrons, to make rules and regulations with reference to the use, only compelling it, when it becomes necessary to determine the exchangeable value, to submit this question to some tribunal administering justice pursuant to due process of law.

In conclusion, I ask, is it a crime to make property generally useful? Is it the policy of the State to exempt property made generally useful from the protection afforded by the Federal Constitution to property not made generally useful?

I know that it is possible to decide this case in favor of the plaintiff in error on the grounds argued by my associates as well as myself without affecting the doctrine of Munn *v.* Illinois; but knowing how that doctrine has been perverted to uses never contemplated by its authors—conscious that it is impossible for the judiciary, under that doctrine, to correct the evils of such perversion—recognizing the fact that cases of public urgency now exist and will exist which do and will necessitate the regulation of property made of general use and consequence, and even the determination of the compensation for such use without the consent of the proprietor in order to prevent oppression and extortion—fully concurring in the power of the *Government* as declared in Munn *v.* Illinois, and differing as to the power of the *Legislative Department* there asserted, I respectfully suggest to the court that the modification of that doctrine to the extent I have indicated will make the power of regulation stronger and more effective, promotive not destructive of enterprise, protective of the public weal as well as of proprietary right.

ARGUMENT

OF

Mr. GEORGE F. EDMUNDS

IN THE

Supreme Court of the United States,

WEDNESDAY, NOVEMBER 21, 1883,

IN THE CASE OF

SPRING VALLEY WATER WORKS,
Plaintiff in Error,

vs.

ANTONE SCHOTTLER AND OTHERS,
Defendants in Error.

REPORTED BY D. F. MURPHY.

Mr. Edmunds: If your Honors please, before I discuss the questions that are before the court, I will endeavor to put out of the discussion what my learned friend, who has just spoken, has brought into it in an irregular way, and that is the proceeding in the Supreme Court of California under the new constitution respecting the establishment of rates for the use of water for municipal purposes. It is perfectly true that my friend has a right, and it is your judicial right, to see and know the opinion of the Supreme Court of California upon that or any other topic, because it is public knowledge; but when you thereby are supposed to know the record in the case that they decided, and the facts established upon which they decided to govern your decision in another case by way of estoppel, or in any other way, I respectfully deny the authority. When that question, if it ever does come, comes to this court, whether in this case or in some other, as to the effect upon the rights of this corporation of its application to the Supreme Court of California, we believe that we have a complete and satisfactory answer. But we submit with some confidence that you have no right to try us upon that record, perfect or imperfect as it may be, for the record is not before you as an estoppel, or as having any effect whatever upon this cause. I can only suppose, therefore, by way of illustration, (because it has no place here at all,) what might have been the conduct of this corporation under the circumstances that then existed. Let us suppose that this constitutional provision—this unconstitutional provision I would rather say—had been put in force, as, of course, it had; it is one of the unhappy fortunes of citizens whose private rights are invaded by the power of the public that they must bear it until this court or some other gives them judicial relief; they must take the law as the law-making power, good or bad, makes it, until they can arrest it by some judicial proceeding. That is clear enough. Let us suppose, therefore, that this constitutional provision went into execution, as it must have done. What was it? It was that every man, every water-taker in the city of San Francisco, should have his water at equal rates with everybody else; that everybody should pay alike—all who took water, whether they were municipalities, or private corporations, or the State, or anybody else; that everybody who participated in the use of water in such ways as are customary on the Pacific coast should contribute an equal proportion to pay for it. Very well. Now suppose this municipal commission, the gentlemen selected by the people who took water, had stepped in, saying, "We will only impose these rates on the white inhabitants of San Francisco; all the colored men shall go free,"—does anybody suppose that such a rate so established could have been collected, and that the company could have enforced it on the ground that the sovereign power of the State had appointed a tribunal, and that that tribunal had said that only half the people of San Francisco should pay, and the other half should have the water free, and that the payers should bear the whole expense?

It is only necessary to state such a proposition to show how wicked and perfectly absurd it is. It is equally true here, that the effect of non-action on the part of this corporation to compel the State to go the whole figure if it went any, was that if they did not make that application to the Supreme Court of California to compel the municipality to pay its share, every private person who took water in that city would say, "I will not pay because this rate that is established bears unequally upon me, and whatever may be the Constitution of the United States about the equal protection of the laws, the Constitution of California has said that we shall have fair play and equal rights, and this municipal tribunal has not established anything of the kind;" and if there is any value at all in the supposition that three departments in a government, State as well as National, are created for the preservation of private rights among other things, then it would be the duty of that third department in the State of California to say, "The rate established by this board is absolutely void because it violates the fundamental provision of equality of burdens required in the matter." So the company could not collect a dollar. Is it to be said, therefore, that it has lost anything of its resisting power against this monstrous robbery, by the fact that it says, "If you are to live by the sword you must perish by the sword, and if you exert any part of your power under this act you must take it all, one and indivisible, so long as it stands."

But why should I waste your Honors' time in discussing questions that are not before you? I am surprised that my learned friend on the other side, for the obvious purpose that he has, should have brought in here the record of a cause that is not before you, and which by this one of many illustrations that I might give is so easily answered. I have never yet heard that a person who obeyed the sovereign command of a State, that invaded his private rights and has compelled him to submit to tribunals that were unconstitutional, lost any rights because he insisted that they should execute the whole law if they executed any part. If there is anything left of liberty in this country—which some people begin to doubt—I do not think that will hold. So I leave it.

Now we come to what is the only question really in this case; and I begin by saying that I still hold, and I suppose some other people do in this country, to the idea that the republican governments of our States are, every one of them, founded upon the intrinsic and fundamental separation of powers, and that this separation of powers into three departments is established for the sole purpose of the protection of individual liberty and rights as distinguished entirely from the co-ordination of the forces of society in the State to carry on public operations, such as building roads or supporting the poor, &c., for all that could be done by a single power. So I affirm with confidence that it rests solely upon the purpose of the people who formed the governments to protect each individual member of society against the tyranny, the passion, or prejudice or error of those exercising the powers of government. Now California, among the others, under the Constitution of the United States, has established a government that contains three departments. It has invested the law-making power in one, the executive power in another, and the judicial power in a third, and it provides that the respective functions of these three departments shall not be blended; that each is a co-ordinate and independent factor for the preservation of these private rights.

I agree, also, that I wish it were the law that it was beyond the scope of legislative power to bargain away any constitutional function. I wish it had been decided in this court in the Ohio Bank tax cases that the power of the Legislature of Ohio to agree that it would not tax a bank beyond a certain sum was a bargain that the Legislature of Ohio could not make. I go the full length of maintaining that no power of the legislative branch of the Government, as well as of its executive and judicial branches, every power that inheres to it by its constitutional birth and construction, can be given away or bargained or lost or suspended for a moment. I maintain all that, and, so maintaining, I submit that one of its inalienable functions is the power and the right to make a bargain in respect of the conduct of a particular business, in a particular place, for a particular purpose, like any other corporation or person; and therefore I maintain that if the Legislature of California, or the Congress of the United States, or any other sovereign legislative body, undertakes to buy my horse or my wheat at a price agreed upon, it has the constitutional power to do it, and that it has the inalienable constitutional power to make any contract with me, if it chooses to do so and I am willing, but I deny that it has the constitutional power, having made that contract, to break it. That is my proposition; so that we come, then, to the question whether the Legislature of California did enter into a business arrangement with this company, and whether, having made a contract about a particular business in a particular place for the supply of a particular commodity, or the use of a particular thing, that State can turn around and say, "I will make another bargain, or will annul the paying part of the old one without the consent of the other side." That is the point.

My learned brother who opened this case called your Honors' attention to the fact that previous to the passage of the act of 1858 there was another law of California which provided that anybody who should go into the business of bringing water to those who needed it in localities should be bound to take whatever the municipality in that locality should declare to be a fair price. No matter if they did it under a contract, nevertheless the municipal authority, it was provided, should have the power to do exactly what this new constitution says this municipal authority may do. It does not appear in the record anywhere—I speak by the record and by the truth as well, I may say—that anybody could be found to engage in the enterprise of supplying one of the three absolute and prime necessities of life to the inhabitants of San Francisco on such terms as the prior act provided. The water did not come. I believe Coke or Blackstone, or somebody that we have not heard of for a great many years, has said that it is needful in construing a new statute to look at the old law, and then to see what was the mischief it failed to reach—why the old law did not work to the end desired, and then there would be light in which to read the intent and purpose of the new law. So we look at this old law, and we find that it had been provided that anybody who engaged in the business of bringing water to San Francisco—it did not use the name of that city, but I take it in the concrete for this purpose—should be subject at all times to the opinion of the persons who were selected by the water-takers, the body of the community, as to the pay he should have for doing that thing. And I will assume for the moment that it was public water, of public right, taken from the most gigantic stream that the Sierras produced. The water did not come. The people who had money, and who had strong arms and spades and iron and the things necessary to bring water fifty miles to the town, did not choose to dispose of their private labor and their private money in that way. I am not speaking out of the record now, because I say it does not appear that anybody did it. From some oversight or other it had not then occurred to those who ruled California that they could *compel* some private citizen to put up his money and his labor and his spades, his iron, &c., and bring water. That will be very easy as a next step, and it is here now already in substance; but it had not occurred to them then that they could compel anybody picked out by name, either corporation or individual, to go out fifty miles and take the two months' rain of California and catch it as it fell, as you would in a bowl, and bring it down; and so some new inducement must be proposed in order to supply this great want. Then came the statute of 1858, not differing in substance a hair from what had existed before, except upon that one vital and crucial point of payment for it. The sovereign power, then having the authority to say so—we all agree to that—said: "If anybody will bring water to San Francisco now, we will change this provision about how he shall be paid for it. He shall be paid a fair price for it, fixed yearly by an arbitration exactly like a private arbitration; one party shall select two, the other party shall select two, and they are to agree if they can. The fifth man does not appear at all in case they agree. If they are unable to agree as to what is a fair and right rate for one year, the four shall select a fifth, so that justice is provided for according to the exigencies of nature and of finance and of labor and supply from year to year." And then the remote possibility is provided for, that if they cannot agree the sheriff of the county, presumably a respectable citizen, shall select the fifth, not necessarily because he is a sheriff, but because some one would occupy that position and be supposably a fair and independent man.

Nor did the State in its sovereign power grant or permit anything other than in a concrete business way in respect of the composition of this board. There is nothing in the constitution of California about boards of arbitration between people who are willing to go into the business of supplying a particular locality with something it wants. The State of California granted to those who had the money and the strength and the material the right to associate together under the name of a corporation, and if they went into that particular business, the State granted them the right to occupy the streets and highways of the community and to condemn private property, though it does not appear in this record that any was condemned. I make no point of that, but as we are going by the record, we might as well speak to it—to take private property for the purpose of enabling them to bring into that locality a particular thing, a substance necessary to the individual lives and health of the people who lived just there; not the people of the United States in general who come and go as on a railroad, but to the owners of the respective divisions of the soil on that promontory, if it may be so called, that smiles upon the Pacific, over the beautiful park now upon one side and the magnificent bay of San Francisco on the other.

If it be possible to conceive of a single business transaction between two bodies of people who are mutually interested in a business which is confined to them alone, this was it. The particular householder and householders aggregated into what we call a municipal community, having their selected agents for their private and particular purposes and no other—that is, the co-ordination of the business of this body of people who are grouped on that spot—say, "We want water; we have a law which says that if we want water and anybody brings it we are to say how much we will pay for it; we cannot get any water on these terms; let us apply to the sovereign power to make it different."

They do. The sovereign power then says that those who will bring water to the city of San Francisco shall be paid for the water that they furnish by weight or measure or by whatever principle may be fixed. How? By what the provision was before? By the judgment of the selected agents of the takers? By no means; but that the furnisher of the water should have always a voice represented by two agents selected by him; that the consumers of the water, the city and its inhabitants, should have a voice represented by two agents selected by them, and in case they cannot agree, by the aid of a fifth mutually chosen. So you see how industrious, as a matter of business and not police, they were in providing the sole thing lacking to the end in view,—how industrious for fair play as a business they were in providing that if the four, the agents of the seller and the agents of the buyer, could not agree, they should choose what was practically an umpire. If they cannot agree in the choice of an umpire, an indifferent and supposbly a highly respected citizen selected by the whole county shall be the person who shall by selection fill up the commission, and that these men so agreed upon shall fix the price. Having fixed it, it shall stand for one year, and then they may readjust it again, and this in order that business, concrete business, fair play between two fixed and definite parties to the arrangement, could go on.

My learned friend (Mr. Rhodes) tells me that is police—the exertion of a sovereign power that may give and take away from year to year and from day to day. Is not that a confounding of all distinctions, so far as we can understand human language and the functions of human institutions?

Now go a little further to the next clause. It was, of course, necessary (and that was police) that, in respect to the occupation of streets and the adjustment of the mechanics of the operation, regulations should be made, and those regulations in the nature of things were police regulations.

Thus it was clearly provided that this special business arrangement as to pay that was made here should not be interfered with; that this specific business arrangement between the buyer and the seller, the laborer and the hirer, if you call it so, (and I do not care which for this purpose,) having been thus established, there still remains, and ought to remain, the right in the proper municipal authorities to regulate the mechanism, the exertion of the franchise, if you may call it that, which these people, who are willing to go into this, will have to exert for the accomplishment of the end in view. So they say the board of supervisors may from time to time make such other provisions about the introduction of this water as they think fit, *not inconsistent* with these that have been agreed upon about the fundamental question of supply and pay. Is that police? That is police, and it is police, as distinguished, as your Honors said in the Sinking-fund cases, and as you intimated in the Granger cases and in the Munn case and all the others, from that right that inheres in a State, as well as it does in individuals, to make a bargain about a business transaction with a person, and is bound to keep it, as well as the other party.

Now, if you can say in the light of this history; if you can say in the light of this language, applying the fair and just intellectual consideration to it which you do always, that this studied arrangement for the particular locality by the particular corporation of a city or county, and the other corporation upon the other side, was merely the exertion of a sovereign power to rule that could have been exerted without the consent of anybody, our case in respect of the contract point is gone. But where do you get the authority to assert that the sovereign power, which, if soveriegn, does not depend upon the will of anybody, could say to these people, "You shall go and bring water from the uplands of the Coast Range, where no water is; you shall take land and you shall fence it in with dikes, and when the rain falls, instead of letting it go off on the surface, you shall save it in boxes, reservoirs, &c., and bring it in." Is that the exertion of sovereign power? It would be very sovereign, indeed, if it could be exerted, but nobody pretends that there was any such power.

But the sovereign power resides solely not in compelling any particular individual or association of individuals to go and do particular things—that violates the very fundamental notion of a just government—but the sovereign power consists in the adjustment and regulation of the performance of *acts*, and that they said we do not do; we make the contract with you to take this water at a certain price. You are to bring it from fifty miles away; get it as you can. Having brought it, *how* you are to carry it through the public streets to the people who are to buy and pay for it on these terms, agreed upon with the municipal authority—I should say that the how and the way is for police regulation; the other is not.

So I repeat—because here is the critical hinge of the whole thing—that it appears to me, with great deference to my learned brother on the other side, that it is impossible to read these provisions of the act of 1858, and particularly in the light of the acts that had preceded it, that brought no water, without coming to the conclusion that the sovereign power of the State of California having the right to make a business arrangement with those who would spend their labor and money for the benefit of a particular town, had undertaken and meant to make it. If they did, granting all that I have said as to sovereign power, I still again insist that it is within the competence of the sovereign power to make a bargain that it cannot break. That is all.

The constitution of the State of California declares, as every constitution ought to declare, that the Legislature may grant charters, or make general laws for the formation of corporations, which shall at all times be subject to alteration and repeal. I agree to that, and stand upon it to its utmost tenor and effect; but the very notion of the existence of a State—it does not require a constitutional provision for that—is that, being a political body, it has a right to make a business arrangement with a particular party, corporate or personal, about a particular thing, and that it is bound to keep it. The constitution of California does not say that its Legislature shall have the power to grant lands for a compensation and then resume the grant; it does not say that it shall have power to grant corporate powers and repeal them and take the property of the corporators; far from it. It only says that the *function* that is has granted it may take away.

All this is consistent, if your Honors please, perfectly consistent with every case that you have decided. It will stand calmly and fairly and without irritation by the side of the Granger cases; it will stand with the Munn case; it will stand with Stone *vs.* Mississippi, and with every other case. It is far from my mission to make any question as to whether your Honors have gone so far that you will feel obliged by and by to modify your decisions or retrace your steps. It is sufficient for my duty to say that, granted that all that you have said stands upon impregnable ground, there is a point beyond that, as you all saw when you rendered these decisions, and carefully put in the *caveats*, beyond which you could not go. It is true that the Scripture says that if a man asks you to go a mile you are to go two, but it does not say three. You can pull up somewhere, even if you follow the most that can be found in the ancient books.

It appears to me that the simple statement of what this is, is about all that can be said about it; but let me suppose one or two things in regard to some of the cases that have already been decided, though before I do that perhaps I ought to make one observation in reply to my brother Rhodes about lotteries.

Referring to the Stone case, he says that there the State granted a charter for a lottery to run so long, and that it repealed the charter, and your Honors held the repeal good. I agree to that. Your Honors said that the protection of the morals of a community, the protection of the public health, everything that enters into what we understand by the term "police regulation," is an inherent and inalienable duty of the sovereign power, that no one of the agents of the sovereign power, as a Legislature of one year, can give away. But suppose that very charter,—to put an extreme case, and I think it safe to put it,—suppose that very charter had provided that these gamblers (I hope I offend nobody's sensibilities) should pay into the State treasury one-half of the net income of the lottery from year to year; after ten years, the State having got $50,000 and the lottery men $50,000 out of the rest of mankind, the State had simply passed a law that they should pay in three-quarters—not repealing the charter—and that if they undertook to stop or withhold this other quarter all their—I do not know what the machinery of lotteries is—dice, boxes, &c., their lottery houses and their tickets, and the whole paraphernalia, all the performance, should be forfeited to the church wardens of the particular parish where it was established, do you suppose that would hold? I rather think not. That is this case.

Let me, before I forget it, also make a simple reference to an inquiry suggested by his Honor, Mr. Justice Miller, yesterday, about the nature of the interest of these supervisors as making them improper judges. His Honor suggested, if I correctly understood him, the inquiry whether this board of supervisors really had any such direct personal interest in the question as would make them improper judges. I think I might say "No" from one point of view; but I respectfully submit that that is not the test.

Suppose that the Legislature of California had granted a charter to a railway company to go from San Francisco to the Oregon line, and had provided that the corporation should select the persons, the board, to assess the land damages all the way up, and they had selected Mr. Justice Field, Judge Sawyer, and Judge Hoffman, three gentlemen who I think we may say would be a perfectly impartial and upright board. Does anybody suppose that would stand fire? And yet no one of the gentlemen had the slightest interest in the question. That is not it. The point is not alone the nature of the personal constitution of the tribunal; not whether you can find out by a trial of the question whether the particular member of that tribunal really has a direct personal interest. Of course if it appeared that he had, however he might have been appointed, that would be bad from quite a different point of view.

But here, when you undertake to say, supposing it a clear case, that in some way it is the condemnation of private property for public use, you must have the foundation of selection of that judicial tribunal, and I use that word industriously, not necessarily a court organized for general purposes, but a tribunal that has the quality through and through of a judicial tribunal, must be selected in an impartial way; as the Supreme Court of Wisconsin has said in a case cited, I believe, in my brother Newlands' brief, where the Legislature of Wisconsin undertook to authorize the city of Milwaukee to condemn land for a public street, in which, of course, no private person in the city had the slightest interest, it authorized the city council to select the persons who were to assess the land damages. By expressions of the strongest kind, carefully written out, the Supreme Court of Wisconsin said how void and wicked such a contrivance was, not because the particular gentlemen selected would have been improper persons selected in some other way, but because the *modus*, the origin of the thing, the principle involved in the selection in such a way was one which outraged all notions of justice and of constitutional law.

In this connection I beg to refer to some notes and illustrations on these questions that I have written out, and to be permitted to hand them up to the court instead of reading them at length.

And here, perhaps, I ought to say that I have been unable to find any decided case anywhere where private property has been taken for municipal purposes and the municipality has been authorized to select the commissioners or board of appraisement, and to say, also, that this is clearly distinguishable from the case of assessments where an abutting proprietor is assessed for the improvement of a street or the laying out of a new street in order that he make his just contribution by the exertion of the taxing power. There the municipal authorities are the competent and proper and usual persons who are authorized to assess the proper special tax. In the one case it is the exertion of the taxing power; in the other case it is the taking of private property for the public use, and in every instance that I know of where it has been undertaken to authorize the municipal authorities to determine the amount of that damage it has been held that it would not do.

These provisions were not police regulations, authoritative merely as an expression of the sovereign will, but they were perfectly conventional, providing for vital business arrangements between two fixed and exclusively interested parties and for a local purpose.

In this case precisely that thing was done which this court so pertinently said was not done in the Granger cases. (94 U. S. Reports, p. 162.)

In the Granger cases, the law being the subject of police repeal and modification, and the law of the charter having fixed a minimum, or authorized the company to fix it, or authorized some reasonable regulation to be made about it, declared that they should not charge more than so and so. His Honor, the Chief Justice, in delivering the opinion, said, with a clear vision of where you might be asked to go, that if the company was not willing to go on and build its road and engage to have the right to take tolls on it depend on the will of the legislature, it might have proposed a special arrangement and have declined to do it. If it wanted something else it should have said to the legislature: "Let us have a provision here which shall arrange what these rates of toll shall be, a special arrangement in regard to the compensation that we are to have." They did not do it. I am not quoting the language but the substance and effect. It is most clearly stated at the top of page 162, in the course of that opinion, as the distinguishing and crucial difference between what was and what might have been if the company did not choose to invest its money in the way proposed.

Now, what did the State of California give to this company? All that the State gave to this company was the right to take land and lay pipes through the streets in order to bring water to the consumer.

Nobody can pretend that it gave anything more. All else the company could do without legislation. And this brings me to ask, after what has been said here, what is water? It is a great delusion to maintain that water is of public right simply *as* water. Public water that belongs to the general public, like the sea, a navigable river, a floatable or boatable river, if you will, is of public right; but the brook that runs across my mountain land in Vermont is not public water or of public right; it is mine, and it is that of my neighbor below and of my neighbor above. The public have no more business or connection with it than they have with the soil over which it runs, or the trout that are in it. And when the law says that I cannot divert it—that I must let it run—I am not letting it run for the benefit of the public, but I am letting it run in recognition of the private right and title that the men below me and above me have to have their share in it. It is all private property. I need not take time about that because there is no dispute in the law books, and never was on any such question.

Now go a step further; take surface water, as it is called, which is this case; can my learned friend find a law book from the time of the Ten Tables down to this day that has ever hinted that surface water that fell upon the smooth surface of a pasture, or the roof of a house, was of either public or private right—that if the man upon whose land or house-roof it fell chose to keep it, he could not do so?

There is not and never has been any difference in the decisions of courts about it. When you have left the region of a flowing stream, which is navigable or floatable, you have left the region of public right altogether. When you have left the region of a flowing stream, which is of private right between adjoining proprietors, and have taken the next step which brings you to California and all that western country, of the rain that comes from heaven and falls over the whole surface of the country and goes off as surface water, you have left all public and riparian rights behind you, and the man on whose lands it falls owns that water just as much as he does the grass that the water causes to grow up. He has a right to keep it if he wishes; he has a right to fence it away from his neighbor. He has no right to collect it by ditching, &c., and pour it off onto his neighbor all in one place, any more than he would have a right to pour off the refuse of his house or any other offensive thing, or to dump his wood on his neighbor's land. This is clear law.

Therefore, when we come to look at this case right in the face of the record it is simply water, and when you look at the books you find that the name "water" does not imply public water, or riparian water, or anything else than the fact of the existence of the thing in which there may be property, as in anything else. There we find that we have the case which is exactly, as my friend on the other side in some of his illustrations said, like gas that is manufactured, or like milk that is got from a cow, or like oil that is pumped up in Pennsylvania from the depths of the earth—like any other *thing* that is convenient and necessary for the promotion of human happiness and human life. Did the State give that to my clients? By no means. Suppose the State (which the record does not show) had given them the right to take the 20,000 acres of this bare, dry, arid slope of the California hills and build the necessary barriers around it to catch and keep the rain that came down from heaven: did that make the water that was thus caught the property of the State of California, or in any way of public right?

If the State of California had repealed this charter altogether, that water and that land would not have belonged to the State of California. And those holding for the moment the power of California were too wise not to see that. They did not choose to repeal this charter, which they might have done. "Oh, no," they said, "you must, as you have engaged to do by undertaking this enterprise, go forward and furnish that water to the corporation and to every person who wants it in the city of San Francisco, and you must furnish it at the price that the municipality choose to say you shall take, and if you do not the water shall be theirs without any price at all;" that is, it shall be forfeited! And yet this is supposed to be a matter of constitutional law, and that we have a Supreme Court of the United States that is bound under the Constitution to see that no State impairs the obligation of its contract, and is now, under the 14th Amendment, bound to see that no State shall deprive any person of his property, either by direction or indirection, without that due process of law which implies fair-dealing, judicial investigation of values, and all that!

It would not have answered the purpose at all to have provided "this charter is repealed," because the city then must have the water, and the property must be devoted to the use of the city. And how were they going to do it without judicial trial and payment? Thus it was clear to the constituents of my distinguished friend that after a repeal they would necessarily subject themselves to a judicial determination of the value of this property; and it was much more convenient to the political notions of the people of California—no, I will not say the people of California, but the body of men who called themselves the people just then—to take this property without paying for it in this way, than it was to say, "We will repeal the charter and turn this thing over to the city, and make them pay what a judicial or in the nature of a judicial tribunal shall say it is worth." That would have been a bed of roses compared to this. It was an ingenuity which Mephistopheles himself might have displayed. I do not charge my friend with it because he did not believe in it at all.

Now suppose we grant that hackmen, and warehousemen and wharfingers, and water-carriers and money-lenders, and wheat-raisers—I will say if the gentlemen wishes me to say it—may be regulated in the exercise of their functions, as in the Munn case, which I am disposed to agree to. What then? Suppose in the Munn case the State had said that Munn and everybody else who engages in the warehousing business shall continue to devote his warehouse and elevator to the elevation and distribution and responsible keeping and handling of the grain of everybody who brings it to him, and if he fails to do that thing the Produce Exchange of Chicago, or the united companies of grain-forwarders, shall have his property by confiscation and forfeiture: is it supposable that your Honors would have had any great trouble or difficulty in saying that that would not do? It is perfectly obvious that short shrift would have been made of such a crime. I need only state it; and yet that is this case. The State of California has not said, "So long as you choose to devote your property to the consumption of the people of the city of San Francisco, you shall submit to a certain rate." That I say they would not have a right to do, because this was a contract as distinguished from a police exertion of sovereign will; but suppose they had the right to say, "So long as you choose to devote your water for the consumption of the city of San Francisco and its people, you shall take the price they are willing to give for it, or that the Supreme Court of the State, or any impartial tribunal fixes," and the watermen say they do not like it, and will stop. The city or the State then says, "No; if you stop the water-takers shall have it for nothing; that is a forfeiture." There is the distinction between regulation and plunder under the color of law.

Even granting away all that has been suggested on our side on the subject of this being clearly a business, as distinguished from a police arrangement, and so within the constitutional protection of the contract,—giving all that away, you have then a case which is as far from the Granger cases and the Munn case, and every other case you have decided, as it is possible to imagine,—not in point of physical distance, but as being on the other side of that line, which some of us below the Bar are not able to see always clearly, but which the judiciary are bound to see, that separates the government of law from robbery.

Take the Alabama baker case, where the city of Mobile had regulated the price of bread—not more necessary than water, I agree; possibly more so in Alabama, but in general not more necessary than water. Suppose the Legislature of Alabama had said that the municipal authorities of Mobile should regulate the price of bread, and every baker engaged then and there in bread-making must continue to furnish bread at the prices fixed by that municipality to everybody that wanted bread, and in case he undertook to ask any different price from that fixed by the municipality, the municipality should become the owner of his bakery as a forfeiture: is there any court under the heaven that would even hear argument from more than one side on such a question? And yet that is this case.

One almost loses one's patience in taking up the time of your Honors in pointing out the distinction between this piece of atrocity,—of legal atrocity, because I agree you have nothing to do with the discretion of the Legislature of California,—and the cases that have been pressed in its support, decided on principles that everybody can understand. We cannot get off on the question whether this rate is reasonable or unreasonable; we cannot make any of the cases you have already decided stand upon that question, because taking the Granger cases, for instance, if you say that the Legislatures of Illinois and Iowa may change or make a maximum of rates, so long as they are reasonable, you are merely saying that it is a judicial question at last, that the courts must determine whether the rate that is fixed or exacted, as the case may be, is reasonable or not; and the thing comes to no result whatever, other than simply a judicial one.

It will not do to say, as has been sometimes suggested, that here is a latitude of discretion in the Legislature, and if it reduces the rate to a mere nominal sum a court can interfere, because that would be saying that if the rate were very unreasonable the judicial power would attach, but if it were only a little unreasonable it would not! We cannot stand on any such distinction as that, I think.

Mr. Justice BRADLEY: What part of the article of the new constitution of California do you refer to, Mr. Edmunds, as compelling the parties to continue to supply water?

Mr. EDMUNDS: It is at the close of article 14 in connection with what I will refer to in another place: "Any person, company, or corporation collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchise and waterworks"—not merely franchise, but property—"of such person, company, or corporation to the city and county or city or town where the same are collected, for public use." It is right to say that this speaks of any person or company collecting water rates, and says that that is the cause of the forfeiture—collecting rates other than those established by the takers, (as I call them, the agents of the takers,) and therefore it may be claimed there is no forfeiture until these other rates are collected. Take it in that literal and sticking-in-the-bark sense, where do you get then? You must either collect the rates you have been authorized by the new tribunal, the agents of the water-takers, to collect, or collect none, or collect your old rates; so that, although it uses the language that if you collect any other rates, taking it with perfect literalness, there is a forfeiture to the takers, you can all see in a moment that it comes in substance to the fact that you must go on and deliver this water at the rate that these takers' agents provide, or the property is gone. The answer may be suggested, "Stop the thing; you need not collect any rates; wind up your corporation;" but the previous law, which we have engaged to obey and which forms a part of the fundamental contract between the State and the company, which the company cannot get away from although the State can, makes it the duty to exercise the franchise of the corporation by carrying on these works and bringing this private property for sale, and we all, I think, know enough of law to know that if a corporation is chartered for a certain purpose and it does not carry out that purpose its charter is subject to forfeiture. Then there is the other provision which declares in unmistakable language that the property can be devoted to no other use. If you throw up and it becomes private property, it is still hampered, but we cannot stop without forfeiture. Supposing our charter had been repealed, we have our private water then; we have our private pipes, and they are in the streets; but the contract law, as it stood when we put down our pipes and gathered our water and made it our property and brought it to the city, was that we never should use this right that we got from the public to bring water for any manufacturing purpose, or for anything else except the supply of the needs of the city and of the people for domestic use. Therefore these parties are in a vise—a vise that they have voluntarily entered into, and that they ought to be willing to bear; but they entered into it, as I said before, about the meaning of the fourth section of the act of 1858—they entered into this duty to do that one thing in that one place for that one purpose, and supplied their property for that use upon the terms that the price of that property supplied in that particular place for that particular use and to that particular people should be settled by a board of arbitration in which they should have a voice, and that it should not be left, as the law stood before, to the agents of the takers and to the municipality itself to determine what it should be. There is the distinction.

So I have confidence in saying that when you look this thing through, taking off its disguises of paint and, as Mr. Clay once said, the flounces and furbelows that obscure the pure Greek beauty of the figure itself—I should say here rather the horrid reality of this contrivance—you have come to the point that this property has been devoted, by an engagement that is binding upon us, to the supply of the particular customers in this particular city, and of the city itself, also a customer, either free or otherwise. And it does not make any difference whether free or otherwise, because by just so much as water is free for what are called public purposes or great public necessities, by just so much the private consumer must pay a higher rate and bear the burden. So it makes no difference, in reality, to this company whether this new provision of the constitution, supposing it were valid, compels the municipality to pay for the water that the municipality uses, or not; it only diminishes the rate to the private consumer and equalizes the burden upon the general taxpayer. We are simply discussing moonshine and fog when we talk about the advantage that this company has got by the decision of the Supreme Court of California, that the city must pay for the water that it takes for municipal purposes. It only diminishes what the private consumer has to pay by so much.

So then I repeat, if your Honors please, that from whatever point of view you look at this, and the more points of view the better, you will see that it was centralized in the business arrangement that, as respected the price of this water that was to be thus gathered and under the franchise granted by the State was to be brought to where it could be utilized, the price of the thing was the essential and crucial business arrangement, and that the mob which then ruled California, with a wisdom that was almost devilish, instead of saying, "We repeal by this constitutional edict all these laws and these charters," (as they might, as your Honors have in substance decided,) and leave the whole thing as private property to be taken for public use under the provisions of the constitution of California and of the United States under the 14th amendment, which now holds a coercion of security over the States that it did not have before in these respects. It was not suitable to do that: oh, no; but, said they, we will provide that the thing which the company has undertaken to do shall still be done, all that it had engaged to do it must continue to do, all that the city of San Francisco had engaged to do under the authority of the State (because it comes exactly to that) it need not do, but it shall settle itself how much it will give.

I agree that a State or a municipality may regulate the conduct of a slaughter-house. I do not agree that it can regulate the price of beef, if it has agreed in advance, or the State has agreed for it, they giving authority to establish a slaughter-house, that the slaughterer of the beef shall sell that beef to the inhabitants of that city for a certain number of years, or an indefinite number of years, at a fixed price agreed upon and fixed under the compact, or to be fixed by a board of arbitration, and change the essential nature of that board, which is quite a different thing.

This case is an illustration, if your Honors please, potent, pregnant, continuous of how valuable is this separation of an organized Government that professes to be civilized into different departments. And the value of that separation depends upon the firmness, the courage, the persistence with which each one of these great departments, charged with their several respective duties, exercises the duty that the Constitution has imposed on it. Sometimes we are inclined, I know, in another branch of the Government (never here) to run away with political power, and we are brought up by the Executive. Sometimes the Executive is inclined to run away with the executive power, and assume functions that do not belong to him. The political or the judicial department of the Government brings him up. But, rather fortunately, as I think, there is nothing very practicable but sober reflection and persistent courage that can remedy the failures and misfortunes of the judiciary. It is the only department of the Government that for all easily practical purposes is beyond the reach of any law but itself, and so it happens that sometimes in the State courts, as in this of California, the impulse of popular commotion, the humor of the time, the cry against corporations, the cry against monopolies, the cry for the rights of the people—which are now and then understood to be the right of every man to get everything that has been earned by everybody else and not to earn anything himself—bears sway. Our national judicial system is framed upon a different foundation, but it always happens everywhere—and it is as old as any experience is in the world—that the crimes or error of government are daily paid for by the body of the people, whether the government be in the hands of kings, or states, or communes. *Quid quid, delirant reges plectuntur Achivi.*

We have gone in this court, I believe, to the full extent of the boundary that protects what are called the people's rights against corporate power and corporate monopoly and assumption. It now remains to be seen whether the momentum which we have gained is so great that we are unable to stop when we come to the precipice over which we are in danger of going. It is said in the Book of Job that—

> "There is a path which no fowl knoweth, and which the vulture's eye hath not seen:
> "The lion's whelps have not trodden it, nor the fierce lion passed by it."

But the calm and pure and beautiful path that Job describes is not the path of discord and dislocation into which, under color and pretense of law, we are urged to go, where everything that is left of private rights and public faith is in this way to be made a mockery.

Supreme Court of the United States.

October Term, 1883.

SPRING VALLEY WATER WORKS,
PLAINTIFF IN ERROR,
vs.
ANTOINE SCHOTTLER ET AL.
No. 288.

Questions, Suggestions, and Illustrations submitted by Mr. Edmunds in the Argument of the Cause.

QUESTIONS.

Was the provision in the fourth section of the act of 1858 respecting the price to be paid for water by the customers a business contract as distinguished from a mere police regulation?

Was the water the individual property of the company, which it had agreed to sell at a fixed price as distinguished from public water, the property of no one, which it only brought by the authority of the franchise and delivered to the takers in the city for a toll?

Had the State the constitutional power to change the arrangement in regard to the price of the water?

If it had such power, so far as it respects the violation of a contract, had it the power to take the plaintiff's property in the water and compel the plaintiff to deliver it in the mode prescribed in the new constitution—*first*, as it regards due process of law; and *second*, as it regards taking private property for public use for a compensation fixed, as in the constitution of 1880 is provided?

The essence of the provision in the act of 1858 was that neither the furnisher nor the taker of the water was alone to fix the price, but each should have a representative and a voice in fixing the price by mutual explanation and discussion and by the service of an umpire. The provisions of the fourth section are industrious for fair play. It is first provided that the company shall furnish the water at reasonable rates, &c. It then provides precisely how, through a mixed tribunal, with an umpire in case of disagreement, the just price shall, from year to year, be determined. It then provides what the board of supervisors may do upon points extrinsic to the price question; that they may prescribe other proper rules relating to the delivery of water not inconsistent with the arrangement mentioned.

It was a more important contract to both parties than if it had fixed the price of water at a given sum per gallon, for the expense of supply might be so great as to make a higher price a necessity to the existence of the works, or the ease and cheapness of doing the work might be such that a price fixed in advance would turn out to be exorbitant.

Thus, the intrinsic and vital point was that each of the two parties to a purely business contract and operation concerning the delivery by one of a thing, his own property, to the other, who needed it for consumption, should, by its chosen agents, agree from year to year on the proper price to be paid for it, and in case of disagreement to add an indifferent person to the board.

Suppose the city of San Francisco, having authority, had itself agreed with the company that the price for the public use of water for the city should be one mill a gallon and for private use should be two mills a gallon, could the city, under the new authority from the State, say it should be only one-half of these sums? Plainly not; for the reason that no act of State power can authorize a party to impair the obligation of a contract, or take private property for private use at all, or for public use without due process of law and for compensation, the amount of which it cannot fix itself, nor make the persons who are to have the property themselves the judges of the amount of compensation. The provision for fixing the price was just as much an engagement between two parties as a private arrangement in the same form could be.

These provisions were not police regulations, authoritative merely as an expression of sovereign will, but they were perfectly conventional, providing for vital business arrangements between two fixed and exclusively interested parties in one locality, and for a local purpose. The distinction between the police regulations for the conduct of the business in the act of bringing and the distributing, and the price of the water of the plaintiff to be sold to the inhabitants of the city, was as wide as that between the regulation of the way of carrying on a slaughter-house and the price of beef.

In this case precisely that thing was done which this court so pertinently said was not done in the Granger cases. (See 94th U. S., p. 162.)

The company had a perfect right to sell its own water without a charter, and to bring it in ordinary vehicles on public roads to any one willing to buy. No one was obliged to buy and no one is obliged to buy now, and the company acquired no right to any private property for the purpose of supplying customers against their will. All that the State gave it was the right to take land and lay its pipes to the city through the streets, &c. Then, the water being there, the company agreed to sell it, and the State agreed that those who should buy should pay for it at a rate to be fixed by a board composed of the agents of the two parties, and in case of difference one indifferent person.

The right to bring and sell was not a franchise at all. The only franchise was the means of bringing. The contract then was not a franchise contract, but was purely, technically, and justly a business contract about the thing that was the property of the seller.

If it be granted that hackmen, warehousemen, bakers, water-carriers, and money-lenders may be regulated and their rates fixed, can legislative power compel them to take a less price than that already lawfully agreed upon from those with whom they have existing contracts at special rates?

If it be granted that the company stands just as if it were a natural person in respect of this question, can it be maintained, or has it ever been decided, that a business arrangement between the State and a person for one particular purpose at one particular place and with one particular party, by which that person becomes bound to furnish a particular commodity of its own at a particular price, which the State has agreed shall be paid, and has entered upon the performance of his duty under the contract, can be changed adversely to the interests and against the will of that party under cover of a police power when there is no question of health or morals or even public policy involved? To so hold would be to say that a State may cheat and rob its innocent and public spirited citizens in order to improve the morals of the community.

Suppose that in the Munn case the public at Chicago needed a great grain warehouse and elevator to handle the stupendous crops of the Northwest, and so had authorized

Munn to take the property of private persons, and of public right on the shore and in the waters of Lake Michigan, whereon to build and carry on such a warehouse and elevator, by which, if he entered on the enterprise and took the land and water front, he became obliged to receive, handle, and deliver to the proper parties all grain brought there on the terms precisely named in this water-act—that is, the price of his service and use, &c., to be fixed from year to year by two representatives of the Produce Exchange, two persons selected by himself, and if they differed, one mutually agreed upon. Would this court have held that the Legislature of Illinois could constitute itself, or the Produce Exchange alone, or any other body, the tribunal to fix the price? Would you not have said that the plain meaning of so exact and studied a provision was intended and understood by both parties to be a business and not a police arrangement?

But even that case is widely distinct from this, for there the price was for the use of property devoted to the public, and which, as the court distinguished, he could employ for other uses if he did not like the police rates; while here the foundation act provided that the sole disposition of the water of the company should be in supplying families, &c., so that the company cannot use its own water for other purposes, and the new provision is, in substance and effect, that a failure to supply at the new price shall work a forfeiture of the whole property. And here, too, it is the thing itself—the property of the plaintiff, which the plaintiff has agreed to sell—that is in question.

Again: Suppose Munn had been a baker, and had even been given a monopoly (which is the reverse of our right in this respect) in regard to supplying Chicago with bread, and had been authorized to take private property and establish a grand bakery on the terms that the price of his bread should be fixed as in this case; and when he had spent millions in getting his works in order, and in raising the finest wheat and making it into the finest flour, and supplying the people, the bread-buyers in State constitutional convention had declared that the price of his bread should be fixed by the aldermen of the city of Chicago, and that if he failed to supply at the prices named by them he should forfeit all his property. What should a court of justice say to that?

Again: Article 14 is on its face a confiscation of all water property for sale, rental, or distribution. It declares that the use of all such water is a public one, and subject to the regulation and *control* of the State. No private contract then existing between mill-owners or adjoining farmers for the sale or use of any water right could escape the domination of the municipal communities in which they were situated. It then proceeds by edict to the fix terms on which private water, supplied under existing contracts, as well as future ones, to cities and towns, shall be paid for—that is, by words of exclusion and inclusion, by the very agents of the very persons, and no others, who are to have the water for their private use. The same provision might with equal lawfulness have been applied to every species of property and every pursuit of man in the State. Where, then, are the guarantees of private rights and of contracts in the National Constitution? It is the despotic kingship of the commune and the mob. *Quid quid delirant reges plectuntur Achivi.*

Suppose the act of 1858 had provided that at the end of ten years, or at any time, the city of San Francisco might buy the property and works of the plaintiff at a price to be fixed by a board of five persons, composed of two to be appointed by the company, two by the city, and, in case of disagreement, one by the four, could the State, after the works were built and put in operation, compel the company to sell its property to the city at a price to be fixed by the board of supervisors alone? Probably no one will so assert. What is the difference in principle or application between the two cases?

The mills on the Merrimac are supplied with water by dams and flowage operated under the eminent domain of the State. Can Massachusetts force a mill-man to sell cotton goods at fixed prices? Or, if it had been provided in advance that they should sell cotton goods to the inhabitants of Lowell at prices fixed each year by a board composed of two persons appointed by the mill-owners, two by the aldermen of the city, and, in case of difference, one by the four, could Massachusetts compel the mill-owners to sell to the people of that city at prices to be fixed solely by the persons selected by these people?

It must be constantly kept in mind that the provisions of the Constitution of 1880, applied to this case, act upon a *pre-existing* arrangement.

It must be remembered, also, that whether the provision of 1858 was a specific contract or not, the provisions of 1880 operate upon existing private property and compel its sale and delivery, against the will of the owner, to those persons who themselves are to select the tribunal for fixing the price. If the whole provision of 1858 had been repealed, and thereby every franchise of the company taken away, its reservoirs, its pipes, and its water would have still been the private property of its stockholders; and yet the State declares that the reservoirs, the pipes, and the water shall be forfeited if the company does not sell its water to the inhabitants of the city at whatever price their own board of supervisors shall fix, or else collect nothing. This, it is confidently submitted, is taking private property without due process of law.

Every case, and every text-book upon the subject, declares that where private property is taken for public use, the State cannot itself fix the compensation to be made, and that the compensation must be fixed by a tribunal that is impartial and that exercises at least quasi-judicial functions. (See Cooley's Constitutional Limitations, page 703; Charles River Bridge *v.* Warren River Bridge, 7th Pickering, 344.)

It is true that, before the fourteenth amendment of the Constitution of the United States, this court had no power to deal with a State law devesting vested rights; but the fourteenth amendment gives this court jurisdiction over cases where the States undertake to deprive their citizens of property, &c., without due process of law; and inasmuch as it is not due process of law to take private property of one person and give it to another, or to take it for public use without just compensation, to be fixed by an impartial tribunal before which the property-owner can be heard and have a trial, it follows that this invasion by the State of California of the property rights of the plaintiff, without giving it a lawful tribunal to fix the value of its property, may be redressed here.

It is confidently submitted that the board of supervisors of San Francisco, elected by the very people, and none others, who use the water, and each uses it for his own private benefit, is not such an impartial tribunal. It is true that every citizen who forms a part of a court or tribunal hearing such cases must have *some* interest in the question to be determined, but this cannot, consistently with constitutional right, be carried to the point of making any man or set of men judges in a case in which they are directly and pecuniarily interested, or to the point of giving them exclusive power to select such judges.

This point is entirely distinct from and consistent with the existence of a power in the municipal government of cities to regulate the prices charged by hackmen, street railroads, and other people engaged in public employments, who are at liberty to engage in such pursuits and to cease them at their free will, and whose property and services are not compulsorily devoted to such uses. Where, as in this case, they are so, their vested rights of property in the things they use and sell cannot be devested and their property taken for public use against their will; but they are entitled under the Constitution to compensation ascertained by an independent and impartial tribunal, before which they can be heard,—which alone is due process of law.

The so-called *Granger* cases and the *Warehouse* case, and all other cases decided by this court upon the powers of the States over corporations and public business, (even if, upon further consideration, they can all be upheld,) fall far short of being authority for what is attempted here. The Railroad cases are all on the subject of the regulation of tolls, or the doing of other things which could not be taken or done without the authority of the State; but the right to take tolls is a right to receive compensation for the transportation of the property of others, and has no connection or analogy with the right of the owner to dispose of his own property at his own price, or at a price he has conventionally agreed to take, and it has no analogy to the taking of private property for public use, and compelling the owner to deliver it to the persons described at a price arbitrarily fixed by a tribunal the reverse of impartial, and without even the right of being heard before it. Neither the Warehouse case nor any of the others cited by the learned counsel for the defendant reach to any such question.

It is assumed that the line of limitation of the arbitrary exertion of public power must, if guarantees always thought to be essential to liberty and property are to have any reality at all, be drawn somewhere; and if it be not drawn here, in the clear space between the extremity to which we have already gone and the leap we are now asked to take, nothing of security remains.

SUMMARY OF CONCLUSIONS.

I. That the fourth section of the act of 1858, on the faith and authority of which the company was formed and expended its money and brought its water to the city, created, when the work was done, an executed contract that was irrevocable without the consent of both parties to it.

II. That, as applied to the state of things then existing as to this company, the provision in the Constitution of 1880, changing the price arrangements concerning the water, was not the exertion of a police power.

III. That even if it was not a violation of contract, it undertook to compel the plaintiff to deliver its water to those who wanted it without due process of law—

1st. In that it cut off from the plaintiff, which was all the time obliged by a valid law to make no other use of its water, than to deliver it to the city and its inhabitants, the right to such payment for it as had been provided when it undertook the work, and forfeited all its property if it presumed to collect any higher rate than the supervisors, representing solely the parties to be benefited, established.

2d. In that it amounted to taking private property for private use, or if for a public use, then by methods as to compensation the reverse of due process of law, by itself appointing the very agents of the consumers to be the judges of the value of the property taken; and that, too, (if that would make it any more vicious,) without giving any right of hearing to the owners of the property.

3d. That even if the convention could have itself fixed the price of the water, (which is denied,) it could not delegate that power to the persons who were to have the water, or to the officers of the municipal corporation selected by such persons, and which corporation was itself a large consumer.

110-348

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McKENNEY

SUPREME COURT OF THE UNITED STATES.

No. 893.

THE SPRING VALLEY WATER WORKS, PLAINTIFF IN ERROR,

VS.

ANTONE SCHOTTLER ET AL., CONSTITUTING THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO.

BRIEF FOR DEFENDANTS IN ERROR.

ALFRED BARSTOW,
Attorney for Defendants in Error.

IN THE SUPREME COURT

OF THE

UNITED STATES.

SPRING VALLEY WATER WORKS,
Plaintiff in Error,
VS.
ANTONE SCHOTTLER et al., CONSTITUTING THE
BOARD OF SUPERVISORS OF SAN FRANCISCO,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

This is a proceeding brought by the Spring Valley Water Works—the plaintiff in error—to procure a writ of mandamus to compel the Board of Supervisors of the City and County of San Francisco, to appoint a Commissioner in place of Isaac Friedlander, deceased, to act as a member of a Board of Commissioners to fix a tariff of rates to be charged for water furnished by plaintiff in error, to the inhabitants of said city and county.

The Plaintiff in Error is a corporation organized under the general laws of the State of California, for the formation of corporations.

There has been in force in this State since the organization of the government a Statute for the formation of corporations, the first chapter of which contains provisions applicable to corporations of every character, and the remaining chapters have provisions applicable to particular. classes of corporations, such as railroad companies, telegraph companies, mining companies, etc. There has also been passed, from time to time, Statutes applicable to particular classes of corporations; but the first chapter of the general law above mentioned is applicable alike to all classes.

The Act of April 30, 1855, amendatory of the Act of April 14, 1853, concerning certain classes of corporations, is cited at length in the brief of the plaintiff in error, p. 9. (Statutes of 1855, p. 205.) The Statute, after mentioning certain kinds of business for which corporations may be formed, provides that they may be formed for the purpose of engaging in "any other species of trade, business, or commerce," etc. On April 22, 1858, the Act cited in the brief of the plaintiff in error, p. 1–3, was passed—Statutes of 1858, p. 218—and on the following day the Act known as the Ensign Act was passed, Stats. 1858, p. 254.

This Act gave Ensign and his associates the right to lay down pipes in the streets of this city and to sell water to the inhabitants. It gave the city the right to use water for the extinguishment of fires free of charge, until such time as some other person or company should introduce water, after which time Ensign was only to furnish his quota of water "for fire and other municipal uses."

It also provided for the appointment of Commissioners to fix the rates to be charged for water, but provided that the rate so fixed should not yield less than 20 per cent. per annum upon the amount of capital invested.

The corporation purports to have been formed under the last two mentioned Acts, and the other laws in force relating to the formation of corporations; but the Ensign Act, having been declared unconstitutional, did not in fact serve as the basis of the corporation.

The Constitution of California, adopted in 1849, contained the following provision :

> ARTICLE IV, SECTION 31.—"Corporations may be formed under "general laws, but shall not be created by special Act, except for municipal purposes. All general laws and special Acts passed pursuant "to this section may be altered from time to time, or repealed."

This provision remained in force until the adoption of the Constitution of 1879, which contains a similar provision.

The corporation, having introduced water, a Board of Commissioners was appointed in January, 1878, in accordance with the provisions of Sec. 4 of the Act of 1858 ; but subsequently, in the same year, one of the Commissioners appointed on behalf of the city and county died, and no person has been appointed as his successor.

The Constitution of California, adopted in 1879, contained special provisions respecting the use of water, and the mode in which the rates for its use should be fixed. (See Article XIV, §§ 1 and 2, brief for plaintiff in error, p. 5.) The provision is to the effect that such rates shall be fixed by the governing body of the municipality at the times and in the manner therein mentioned.

The plaintiff in error, notwithstanding the above mentioned provisions of the Constitution, claimed that the rates for water must be fixed by virtue of the provisions of Section 4 of the Act of 1858; and, accordingly, demanded that the Board of Supervisors—the defendants in error—should appoint a Commissioner to fill the vacancy occasioned by the death of one of their appointees; and the Board, having refused to make such appointment, the plaintiff in error applied to the Supreme Court for a mandamus to compel the Board to make such appointment.

An alternative writ having issued, the cause was brought on to a hearing upon the petition and the demurrer thereto, and the application for a peremptory writ of mandamus was denied.

I.

The Fourth Section of the Act of 1858, does not constitute a contract between the State and the Corporation.

1. That section is a portion of a general law for the formation of corporations within the sense of Sec. 31, Art. 4, of the Constitution of 1849, above cited. The scope and meaning of that section, in this respect, will be readily perceived, if there is borne in mind the numerous and detailed provisions of the former *special* charters of corporations.

Those provisions covered all matters relating to the *powers, duties, liabilities, restrictions* and *responsibilities* of the corporation.

The Charter of Dartmouth College, recited in the report in 4 Wheaton, p. 518, is an instance of a special corporation, containing all the details for the creation and organization of such an institution.

The Statutes of the several States will disclose numerous instances of the formation of corporations by special acts; and when the provisions in detail are noticed, it will be seen what was intended to be accomplished by constitutional provisions similar to those of Sec. 31, Art. 4, of our Constitution. Instead of a series of acts for the formation of the several corporations of the same class, each differing in its details, it was intended that one act should furnish the *whole system* for the *whole class*, and that the general mode for the formation of such corporations, and all the details of each, should be the same. It was intended that the general law or laws, should cover the entire field occupied by the several special acts. The provision in the Dartmouth College Charter, for the appointment of a tutor, treasurer or usher, is as much a part of the charter for the organization of the college—as much a portion of the law for formation of that corporation—as is the provisions that the trustees shall be a body corporate, etc.

2. We are not without authority on this precise point. Sec. 4 of the Act of April 22, 1858, contains several provisions to the effect that the corporation shall furnish water to the inhabitants of the city, etc., at reasonable rates, and without distinction of persons; that it shall furnish water to the city, to the extent of its means, "in case of fire or other great necessity," free of charge; that the rates shall be fixed by a Board of Commissioners, to be appointed as therein provided, and that the city authorities may prescribe such other proper rules relating to the delivery of water," etc.

The Ensign Act (Stats. 1858, p. 254) provided in the third section that the Chief Engineer of the Fire Department might tap the water pipes and receive water for the extinguishment of fires free of charge, until such time as some other person or persons shall introduce water, when Ensign, his associates and assigns—the corporation to be formed under Sec. 8 of the Act—should furnish, "for fire and other municipal uses, their quota" of water, free of charge, etc. Sec. 4 provides that the rates should be fixed by five Commissioners, to be appointed in the same manner as those provided for by the Act of April 22, 1858; but the rates were to be fixed so as not to yield less than twenty per cent. per annum upon the capital, and that if the city should not elect to purchase those works, as it was authorized to do in a certain event, then the Board of Supervisors might fix the rates for water, etc.

An action was brought by the city against the plaintiff in error to determine the question whether the city had the right to take water from the pipes of the corporation, free of charge, for all other municipal uses, as well as for the extinguishment of fires, the claim of the city being based on Sec. 3 of the Ensign Act. In

San Francisco vs. *Spring Valley W. W.*, 48 Cal., 493,

It was held that the Ensign Act was a special Act for the formation of corporations, and therefore unconstitutional and void, and that the rights of the parties were to be determined by the general law for the formation of corporations, including the 4th Section of the Act of April 22, 1858. Many of the statutory provisions and ordinances are more fully stated in the same case, as reported on a former appeal, in 39 Cal., 473.

That decision would seem to be conclusive upon the proposition that the several provisions of the 4th Sec. of the Act of April 22, 1858, are only provisions of law for the formation of corporations. If the clause of the Statute prescribing what water should be furnished to the city free, comes within that category, clearly the clause providing for the fixing of rates would also be included.

That doctrine was affirmed in

Waterloo Turnpike vs. *Cole*, 51 Cal., 381.

The law, which was there held to be unconstitutional, required the Board of Supervisors to authorize the corporation to collect such tolls as would produce a certain revenue. If that be a provision for the formation of corporations of that class, clearly the one in question here is such a provision.

The question involved in

Parker vs. *Metropolitan R. R. Co.*, 109 Mass., 506,

Was whether the Legislature, under its reserved power to amend, alter or repeal acts of incorporation, could change the tolls to be collected by the Ferry; and the reduction of tolls was upheld, as coming within the power reserved to the Legislature.

The fourth Section of the Act of 1858 is a law for the formation of water companies, and, being such, it was subject to alteration or repeal. It was repealed by the provisions of Sec. 1, Art. 14, of the present Constitution, which provides the mode in which rates for water shall be fixed.

A Statute which may be repealed by the Legislature, may be repealed by the adoption of a constitutional provision.

3. The proviso to § 1, Art. XIV, of the Constitution (see brief for Plff. in Error, p. 5) is self executing. It is as complete in all its parts as would be a Statute drawn for that purpose; and no Statute is required in order to enable the governing body of the municipality to exercise the power conferred by that section.

McDonald vs. *Patterson*, 54 Cal., 245.
People vs. *Hoge*, 55 Cal., 612.
People vs. *Supervisors of Sacramento*, Sept., 1881.

4. When the power is reserved to the Legislature to amend or repeal a Statute, the power may be exercised, even when the Statute, were it not for such reservation, would be construed as a contract, coming within the protection of the Constitution of the United States, which forbids the passage of laws imparing the obligation of contracts.

Hoge vs. *R. R. Co.*, 99 U. S., 351.
Tomlinson vs. *Jessup*, 15 Wall., 457.

In each of those cases, the laws of South Carolina forming the corporation, provided for the exemption of the property of the corporation from taxation for a certain period. But at the several times when those laws were passed, there was a law in force, to the effect that every charter of a corporation shall remain subject to amendment, alteration or repeal ; and it was held that the provision of the Constitution, subsequently adopted, subjecting the property to taxation, was valid. See, also,

R. R. Co. vs. *Maine*, 96 U. S., 510.
New Jersey vs. *Yard*, 95 U. S., 111.

In the case last cited, the Court say that this constitutional power to amend or repeal such law, is an *inalienable legislative power*.

5. Mr. Justice Story, in *Dartmouth College vs. Woodward, supra*, says: "No power is reserved to the crown or government, in any manner, to alter, amend, or control the charter." In all the above cases, and numberless others that might be cited, that reservation furnished the test of the power of the Legislature ; and in that reservation is found the source of the authority which Legislatures are now constantly exercising, but which they could not, under the former system, exercise so as to operate upon existing corporations. Under that reservation, while the Legislature can not divest the corporation of its rights of property, it may produce the most radical changes in the organization, or in its relations to the public.

Under the former system for the organization of corporations, Sec. 4 of the Act of 1858, would not have been regarded as a contract coming within the protection of the constitutional prohibition of laws impairing the obligations of contracts. The Chief Justice, in the Dartmouth College case (p. 627), says that the *contracts* intended to be protected are "contracts respecting property, under which some individual could claim a right to something beneficial to himself," and do not comprehend laws concerning civil institutions, or those relating to offices within a State, for State purposes.

It it said by the Chief Justice in

Stone vs. *Mississippi*, 101 U. S., 816,

"In this connection, however, it is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain." The Chief Justice also says: "The contracts which the constitution protects, are those which relate to the property rights, not governmental. See, also,—

Sinking Fund Cases, 99 U. S., 718.
Chicago Bank & Q. R. R. vs. *Iowa*, 94 U. S., 155.
Railroad vs. *Maine*, 96 U. S., 510.
Miller vs. *State*, 15 Wall., 498.
Holyoke vs. *Lyman*, Id., 519.
Tomlinson vs. *Jessup*, Id., 459.
Mayor of Worcester vs. *N. & W. R. R. Co.*, 109 Mass., 103.

6. If the Legislature, by virtue of the reserved power to alter or repeal the law, may directly change the tolls or rates which the corporation may collect, there would seem to be no ground for the position that the Legislature cannot alter the mode or agency by which the tolls or rates are, from time to time, to be fixed.

Parker vs. *Metropolitan R. R.*, 109 Mass., 506.
Shields vs. *Ohio*, 95 U. S., 319.

In those cases the rates were directly fixed by law, and the laws were upheld.

7. The Statutes of the State for the formation of corporations, both the chapter applicable to all classes of corporations, and the chapters or Acts making provisions respecting the several classes, have been amended at almost every session of the Legislature since the organization of the government, and in no case, so far as we are aware, has it been held that it was not a legitimate exercise of the power reserved to the Legislature.

8. It will not be doubted that the decisions of the State Court, as to the construction of the Constitution—to the effect that the section of the statute in question is a law for the formation of corporations—is binding upon the Federal Courts.

People vs. *Weaver*, 100 U. S., 541.
State Railroad Tax Cases, 92 U. S., 575-606.
Stone vs. *Wisconsin*, 94 U. S., 181.
Hall vs. *McCuir*, 95 U. S., 500.
A. & P. R. R vs. *Hopkins*, 94 U. S., 13.
Lanahan vs. *Sears*, 102 U. S., 318.

II.

If the Section of the Statute in question be construed as a Contract, then the State had authority to Alter its Terms.

The constitutional provision—Sec. 31, Art. IV.—is to be read in connection with the Statute, and constitutes one of its terms. That provision constitutes a part of every charter, and every section of it, as fully as if it were inserted in each, and if any section is claimed to be a contract, the constitutional provision necessarily forms an essential portion of it.

Dartmouth College vs. *Woodward*, 4 Wheat., 518, held that the charter was a contract; and that, we understand, accords with the general current of the decisions in cases where the law under which the corporation was organized, contains no reservation of the power to amend or repeal the law.

But a party to such a contract as we have here, cannot complain that the other party to it impairs its obligation when it—the State—merely exercises a power which is expressly reserved by the terms of the contract itself. A contract cannot be said to be impaired by the doing of an act which the contract expressly stipulates may be done by one of the parties.

But this question is effectually put at rest by the decision in *San Francisco* vs. *Spring Valley W. W.*, 48 Cal., 493. In considering that clause of the Constitution, the Court say: "It was intended by this provision to keep corporations within a wholesome control, and to repel the assumption that their rights were held under a *contract* which the Legislature was powerless to modify."

III.

The amendment of Sec. 4 of the Act of April 22, 1858, by the provision found in Sec. 1, Art. XIV, of the Constitution, will be upheld as a valid exercise of the Police Power.

License Cases, 5 How., 583.
Munn vs. *Illinois*, 94 U. S., 113.
Beer Company vs. *Massachusetts*, 97 U. S., 113.
Stone vs. *Mississippi*, 101 U. S., 816.

In the first case above (5 How.) the Chief Justice says that in the exercise of police power it has been customary to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, and in so doing to fix the maximum of charges for services rendered, etc., and cites

Aldnutt vs. *Inglis*, 12 East., 527.

A large and important addition can be made to the above list, such as railroads, street railroads, telegraph, gaslight and water companies. The Court further says in 5 How., that "when private property is devoted to a public use, it is subject to public regulation."

Stone vs. *Mississippi*, 101 U. S., 816, Is very clear authority in support of this proposition. A lottery having been authorized, and a corporation created to manage it, and its duration fixed, and the several amounts to be paid to the State determined, and the Constitution which was subsequently adopted having prohibited lotteries, the question presented was, whether the Act made a contract which was beyond the reach of the constitutional prohibition. The Court held that the Legislature could not divest itself of the police power (p. 817); that it could not bargain away the public health or public morals (p. 819); and that the Constitution repealed the charter. And the Court said that "whether the alleged contract exists or not, depends on the authority of the Legislature to bind the State, and the people of the State, in that way." See, also,

Metropolitan Board vs. *Barrie*, 34 N. Y., 657.
Moore vs. *State*, 48 Miss., 147.
3 Parsons on Contracts, 556.

A corporation organized in California is in many respects a different being from that which was before the Court in the Dartmouth College case. In most of the States corporations are formed under general laws, and the purposes for which they may be formed have, from time to time, been enlarged; and no State has proceeded further in that direction than California, when the provision, which has been in force since 1855, is to the effect that they may be formed "*for the purpose of engaging in any other species of trade, business, or commerce, foreign or domestic.*" When corporations may be formed for almost any conceivable species of business, the necessity for the preservation, unimpaired, of the police power of the State, as well as of the power of amendment and repeal of the laws under which they were or may be formed, becomes very manifest. In this condition of the law, and in the nature of things, there is no reason why a water company should have the benefit of an irrepealable law, any more than should an individual engaged in the same business. The circumstance that the persons forming the corporation have the benefit of a name under which they may have succession during the period of the existence of the corporation, may acquire and hold property, and sue and be sued, should not, in any degree, exempt them from the operation of the police power. If this power extends to the regulation of the rates for water, gas, etc., it must of necessity apply to corporations as well as individuals, and perhaps with more propriety.

IV.

The Amendment of the Statute resulting from the Adoption of Art. XIV, is Not Unreasonable.

The Courts have not undertaken to furnish a test for the determination of the question, whether a given amendment of the law is unreasonable. Without doubt a law impairing the rights of a corporation to its property, or divesting it of a *vested right*, would be held invalid; and it would seem to be equally clear, that a law which merely changed the officers by whom certain of the relations of the corporation with the public are regulated, would not be obnoxious to the objection. It cannot be claimed by the corporation that the rates shall not be fixed by authority of law, for it was formed under a law which provided for the fixing of rates. Can it be said that the delegation of this authority to the "governing body" of the city is unreasonable? The liability to injury is no greater in this case than is that of the street railroad company or the baker or the hackman. This corporation has no better right, derived from the character of its business or ownership of property, than have the other persons mentioned, to demand exemption from the control or interference of the "governing" body of the city. The corporation might complain of the rates, when fixed, if they be too low, but not of the instrumentality provided by the law for fixing them. The State may, without invading the rights of the corporation, select its agents for that purpose, in any way it may deem proper.

Respectfully submitted,

ALFRED BARSTOW,

Att'y for Deft's in Error.

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OFFICE SUPREME COURT U.S.
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SUPREME COURT OF THE UNITED STATES.

No. 893.

THE SPRING VALLEY WATER WORKS,
Plaintiffs in Error.
vs.
ANTONE SCHOTTLER ET AL., CONSTITUTING THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,
Defendants in Error.

Supplemental Brief for Defendants in Error.

RHODES & BARSTOW,
Attorneys for Defendants in Error.

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Defendants in Error.

Since the former submission of this cause upon printed Briefs, several cases have been decided which are in point upon several of the questions involved in this case, and we ask leave to refer to them, as well as to a few other cases.

Upon point I, Sub. 5, p. 6, of our former Brief, we cite,

Greenwood v. *Freight R. R. Co.*, 105 U. S. 13.
~~p. 227, Oct. term, 1881,~~

as one of the clearest cases of the exercise by the Legislature of the reserved power to amend or repeal the charters of corporations. In that case the Court refers to the suggestion of Mr. Justice Story in the *Dartmouth College Case*—

that a provision in the Statute reserving to the Legislature the right to amend or repeal the charter, must be held to be a *part of the contract* between the State and the corporation. See also

Railroad v. *Hammersly*, 104, U. S., 1.

The Statute under consideration in that case required the corporation to establish a depot at a specified place, upon certain conditions—the depot having previously been abandoned under authority conferred by an earlier Statute. See also

Pennsylvania College Cases, 13 Wall., 212.

Machine Co. v. *Gage*, 100 U. S., 676.
Wrightman v. *Clark*, 103 U. S. 260.
Post v. *Supervisors*, 105 U. S., 667.

In support of point I. Sub. 8, p. 7, of our former Brief, we cite

State of Louisiana v. *Pilsbury*, 105 U. S., 294.
~~script 514, Oct. term, 1881;~~
Pike v. *Chicago etc. Ry.*, 94 U. S., 176.
Railroad Co. v. *Georgia*, 98 U. S., 360.
Moores v. *National Bank*, 104, U. S., 629;
Tioga R. R. Co. v. *Blossburg & C. R. R.*, 20 Wall., 137;
Kibbe v. *Ditto et al.*, 93 U. S., 674;
Fairfield v. *County of Gallatin*, 100 U. S., 47.

In the case first above cited it is held that the construction of the Constitution of the State, as given by the highest Court of the State, will be accepted by this Court as correct and conclusive.

The Supreme Court of California, on the 30th day of June, 1882, decided

Spring Valley Water Works v. *Board of Supervisors of San Francisco.*

The decision not having been published in the California Reports, the opinions of the Justices are hereto appended.

This action was an application for a writ of mandamus to compel the Board of Supervisors to fix the rates to be paid to the Water Company, for water supplied to the City and County, as well as to the inhabitants thereof. The only controversy was in respect to the matter mentioned in Sec.

4, of the Act of 1858. That section is to be found in Brief of plaintiffs, in error, p. 2. The provision in question of that section, is to the effect that corporations "shall furnish water to the extent of their means to such City and County, or City or Town, in case of fire or other great necessity, free of charge." The water so to be furnished has been denominated in this class of actions, "*free water*."

The Company claimed that the Constitution of the State adopted, in 1879, Art. XIV, Sec. 1 (see Brief of Plaintiff's, in error, p. 5), required that the Board of Supervisors should fix the rates for that which had theretofore been "free water," as well as for that which was supplied to the inhabitants of the City and County.

The Court *held* that the provision of Sec. 4, of the Act of 1858, requiring corporations to furnish *free water*, was abrogated by the above mentioned section of the Constitution; and that the same section required the Board of Supervisors to fix their rates for *all* water supplied to the City and County, including that which had theretofore been "free water."

This decision, in so far as it determines that the Constitution abrogates the statutory provision requiring water corporations to supply the municipalities with "free water," is conclusive beyond all question, and will be regarded by this Court in the same light as a decision of that Court construing a State Statute.

If it be true, as contended by the plaintiff, that the right to participate in the selection of the Commissioners to fix water rates, as provided by Sec. 4, of the Act of 1858, was granted to the corporation, in consideration of its obligation to furnish free water, then, when the State has relieved the corporation of that obligation, it has no just ground to complain that the Constitution has deprived it of any right, by prescribing a mode for fixing rates different from that prescribed by the Act of 1858. If the plaintiff's position be true—but we do not concede it to be true—then the result above indicated must follow.

A reversal of this judgment would disarrange the system prescribed by the Constitution for the control of persons and corporations engaged in supplying water for public use. We respectfully submit that the judgment should be affirmed.

A. L. RHODES and
ALFRED BARSTOW.
Att'ys for Def'ts in Error.

APPENDIX.

◆

SUPREME COURT DECISION.

IN BANK.

[Filed June 30, 1882.]

THE SPRING VALLEY WATER WORKS *vs.* THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO.	No. 8,340.

This is an application for a peremptory writ of *mandamus* to compel the defendants, as the Board of Supervisors of the City and County of San Francisco, to proceed forthwith to fix the rates or compensation to be collected for the use of all water supplied by the petitioner to the City and County of San Francisco, as well as to the inhabitants thereof, and also praying that it may be adjudged that the petitioner is not under obligation to furnish water to said city and county, for any municipal purpose whatever, free of charge. The petition contains the proper, general and introductory allegations showing that the plaintiff was, on the 19th day of June, 1858, duly incorporated under the laws of this State, for the purpose of introducing pure and fresh water into the City of San Francisco; that it has erected the necessary works, and expended a large sum of money to that end, and that it has already introduced water into the city, and has commenced to supply it, and the inhabitants thereof, with pure, fresh water; that the petitioner alone supplies all the water taken for the extinguishment of fires, irrigation of public squares and parks, sprinkling of streets, flushing of sewers, and for all other municipal purposes; that there are no public works owned or controlled by said city and county for supplying the same with water. It further states that no rates have been fixed by the Board of Supervisors of said city and county, although application has been made to the Board of Supervisors to fix such rates or compensation, and that the said Board has refused and still refuses to fix any rates or compensation to be charged, collected or paid, for water supplied to said city and county, for any municipal purpose whatever, except for the single purpose denominated "family uses."

The answer of the defendants admits that the petitioner, the Spring Valley Water Works, was, on the 19th day of June, 1858, and now is, a corporation organized and existing under the laws of the State of California, and avers that when the Company became incorporated, it assumed an obligation to furnish water, to the extent of its means, to the City and County of San Francisco for the extinguishment of fires, the flushing of sewers and the watering of parks, free of charge, which is still in full force, and therefore defendants allege that it is not their duty to fix rates or compensation to be charged, collected or paid for water supplied to said city and county, for any municipal purpose, except for the single purpose denominated, family uses; and they pray to be hence dismissed.

The issues made in the case, and the questions upon which the Court is called upon to pass, clearly appear from the pleadings, and I will proceed to examine them with that care and deliberation which their great importance demands.

The petitioner was incoporated under "An Act for the Incorporation of Water Companies," approved April 22, 1858, the fourth section of which provides that "all corporations formed under the provisions of this act, or claiming any of the privileges of the same, shall furnish pure, fresh water to the inhabitants of such city and county, or city, or town, for family uses, so long as the supply permits, at reasonable rates, and without distinction of persons, upon proper demand therefor, *and shall furnish water to the extent of their means to such city and county, or city, or town, in case of fire, or other great necessity, free of charge.*" Under that portion of the section which I have italicised, it has been held by this Court that "it is the duty of the Spring Valley Water Works to furnish water free to the city and county in case of fire, and also in case it is demanded for irrigating the parks and squares, watering the streets and flushing the sewers."

> *S. V. W. W.* vs. *San Francisco*, 52 Cal. 111;
> *San Diego Water Co.* vs. *San Diego*, 8 Pac. C. L. J., 1123.

It therefore follows, as a consequence, that if Section 4 of the act of 1858 is still in existence, this Court has no right, by mandamus, to compel the Board of Supervisors to fix the rates or compensation for water to be furnished the city, which the Company is obliged to furnish without charge, and therefore that portion of petitioner's prayer should be denied.

But it is claimed, on behalf of the petitioner, that the act of 1858, so far as the same relates to free water, *so called*, has been abrogated and annulled by the provisions of the Constitution, that went into effect on the first day of January, 1880. One of the provisions of the Constitution, which, it is claimed, abrogate the act of 1858, is Section 19 of Article XI, which read as follows:

"In any city where there are no public works owned and controlled by the municipality, for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this State, shall, under the direction of the Superintendent of Streets, or other officer in control thereof, and under such regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gas-light or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

It will be observed that Section 19 of Article XI declares that any individual or company, duly incorporated under the laws of this State, shall, under certain conditions prescribed, have the privilege of using the public streets and thoroughfares for laying down pipes and conduits therein for introducing and supplying such city and its inhabitants with fresh water for domestic and all other purposes, "upon the condition that the municipal government shall have the right to regulate the charges thereof."

By the third section of the act of 1858 it is provided that "all privileges, immunities and franchises that may hereafter be granted to any individual or individuals, or to any corporation or corporations, relating to the introduction of fresh water into the City and County of San Francisco, or into any city or town in this State, for the use of the inhabitants thereof, are hereby granted to all companies incorporated, or that may hereafter become incorporated, for the purposes aforesaid."

It is claimed on behalf of the petitioner that by virtue of the above section the Spring Valley Water Works was put upon an equality with any individual or corporation to whom the right of introducing fresh water into the city should afterwards be granted, and that as such right has been granted by a provision of the Constitution to any individual or corporation to introduce water into the city for sale, without any limitation or condition except the sole condition of having the rates fixed by the Board of Supervisors; therefore the obligation imposed upon the Spring Valley Water Works to furnish free water has been removed.

I think the position is well taken; for if any other individual or corporation has the right to introduce water into the city for its use, and to demand pay therefor, the Spring

Valley Company stands on the same footing, and is entitled to the same "privileges, immunities and franchises." To impose upon the petitioner the obligation of furnishing water to the city for certain purposes free, would be withholding from it privileges and immunities, and would be imposing upon it burdens not cast upon any other individual or corporation provided for by Section 19 of Article XI of the Constitution. It may be that no other individual or corporation has laid pipes or introduced water into the city for its use or for the use of the inhabitants thereof, but the right to do so is clearly granted by the Constitution, subject to certain conditions therein prescribed, none of which provide for or contemplate free water, and this is a privilege and immunity within the meaning of Section 3 of the Act of 1858, which *ipso facto* relieves the petitioner from the obligation of furnishing water free, under Section 4 of the same act.

2. But there is another ground relied upon by petitioner, which seems even stronger than the one above presented. By Section 1 of Article XIV of the Constitution it is provided that "the use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law: provided, that the rates or compensation to be collected by any person, company or corporation in this State, for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed annually by the Board of Supervisors, or city and county, or city or town council or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or

resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the Legislature may prescribe. Any person company or corporation collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchises and water works of such person, company or corporation to the city and county, or city or town where the same are collected, for the public use."

The provision contained in the above article to the effect that "the rates or compensation to be collected by any person, company or corporation in this State, for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed," etc., is as broad and comprehensive as the English language could make it, and gives to the Board of Supervisors of the city plenary power over the subject matter to which the article relates. Water supplied to the city and county is as fully covered by the express language of the article as is water supplied to the individual consumers, and the whole matter of rates or compensation is placed within the power and control of the Board of Supervisors.

Section four of the act of 1858, which imposes upon water companies the duty of furnishing water to cities and towns in case of fire or other great necessity free of charge, also provides that the rates to be charged for water shall be determined by a Board of Commissioners, two of whom to be elected by the city and county, or city or town authorities, and two by the water company, and in case the four cannot agree, the four Commissioners shall select a fifth.

The effect of the present constitution upon the clause of section 4 of the act of 1858, last referred to, was under consideration by this Court in the late case of the

Spring Valley Water Works vs. *The Board of Supervisors of San Francisco*, 7 Pac. C. L. J., 614, and it was there held that the portion of Section 4 which gave to the Company a voice in fixing the rates or compensation for water furnished the City of San Francisco or the inhabitants thereof, was taken away by Article XIV of the Constitution. In that case Mr. Justice McKee, delivering the majority opinion of the Court, says: "A privilege of participating in the selection of agents for the performance of a public duty between it and the public has been taken away; but that privilege was in no sense a part of the contract between it and the State. The State was not under any obligation to continue it or to make it coexistent with the grant of the charter. As a mere privilege, the Company held it subject to the retained power of the the State, in the exercise of which it was liable at any time to be modified or annulled. By the constitutional amendment the State has annulled it; but in doing so, it has not interfered with the charter of the Company or disturbed any right of property acquired under it, or obstructed the Company in the enjoyment of any of these rights."

It seems to me that the decision in the above case has a bearing upon the case now under consideration, for if the Constitution took from the Water Company the privilege of having a voice in fixing the rates it might charge for water supplied, it also releived the Company of the duty of supplying water to the city for any purpose free of charge. The consideration for the duty imposed upon the Company to supply free water was the privilege conferred by the same section of the act upon the Company to participate in fixing the water rates. The duty and privilege were correlative and when the privilege was taken away the corresponding duty ceased to exist.

But I am not obliged to rely upon this line of argument to support the conclusion arrived at in the case now before us. The plain language and obvious intention of the Constitution force me to the same conclusion. It was the manifest purpose of that instrument to frame a scheme covering the entire subject of water supply: "The use of water now appropriated or that may hereafter be appropriated for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law; *provided*, that the rates or compensation * * for the use of water supplied to any city and county * * shall be fixed, annually, by the Board of Supervisors."

The time for the performance of this duty is the month of February in each year. The duty imposed by the Constitution, as well as the time for its performance, are plainly marked out in the Constitution—its provisions being both mandatory and self-executing. But if legislation on the subject were necessary, I find it in the act of March 7, 1881, the first section of which provides as follows:

"The Board of Supervisors, Town Council, Board of Aldermen, or other legislative body of any city and county, city or town, are hereby authorized and empowered, and it is made their official duty, to annually fix the rates that shall be charged and collected by any person, company, association or corporation, for water furnished to any such city and county, or city, or town, or the inhabitants thereof."

This act follows the language of the Constitution. It contains numerous details, applicable to the subject, and the eighth section thereof imposes a penalty on the Board of Supervisors or other legislative body for a failure to perform any of the duties prescribed by it.

I have endeavored to show that Section 4 of the Act of 1858 which made it the duty of the petitioner to furnish water to the City of San Francisco for certain purposes, without any compensation therefor, has been abrogated by the Constitution. It was a duty imposed upon the Company by the law, and it was within the power of the Legislature, and, *a fortiori*, of the framers of the Constitution, at any time, to relieve the Water Company from the obligation.

But if permitted to inquire into the motives of the Constitutional Convention in discharging the Water Company from an obligation imposed upon it by the law of its creation it will not be difficult to discover a sufficient motive. The Company must be compensated for the water supplied by it. This compensation may be fair and just, or it may be unjust and exorbitant. Whether it is the one or the other, an unfair and disproportionate burden fell upon the individual consumers under the operation of the act of 1858. The water furnished the city for the extinguishment of fires, and other great necessity, was not paid for by the city out of funds arising from taxes upon city property, but it was indirectly paid for by the individual consumers of the water. The owner of a large and very valuable building, used as a store or warehouse, in which but little if any water is used, enjoys benefits resulting from the use of the water in extinguishing fires, and the protection of his property, as well as the reduction of the rate of insurance thereon, but he contributes little or nothing to the Water Company for the benefits thus conferred. The householder, occupying a small residence of comparatively but little value, is required to pay for all the water used by him. It is too plain to require argument, that if the Water Company is to receive compensation for all the water furnished by it (and that it is will hardly be denied), the burden under the act of 1858, fell almost exclusively upon the consumers, and the owners of valuable property, enjoying the protection and other benefits from the water, paid little or nothing. It was to distribute the burden more equally that the new Constitution abolished free water.

And there is no hardship in the new rule of rates or compensation introduced by the Constitution. The matter has been placed in the hands and under the power and control of the Board of Supervisors of the city and county. This body represents the people of the city, one member being selected from each of the twelve districts thereof. It is their duty to protect the rights of the city and the individual rights of the citizens. It also owes certain duties to the individual or corporation furnishing water for the use of the city and the inhabitants thereof. If, in fixing the rates or compensation it is governed by fair and disinterested motives, and does establish such rates as will be fair and just to the Water Company, as well as to the people, distributing the burden as equally and justly as possible among the consumers, as well as the property-owners, who enjoy the benefits and protection which the presence of the water in the city affords, no one will have any cause to complain of the scheme adopted by the new Constitution.

Writ granted as prayed for.

MORRISON, C. J.

CONCURRING OPINIONS.

I concur in the judgment for the reasons stated in my dissenting opinion in the case of the *Spring Valley Water Works* vs. *The Board of Supervisors of San Francisco*, 7 Pac. C. L. J., 614, and in my concurring opinion in the case of *San Francisco Pioneer Woolen Factory* vs. *Brickwedel*, 9 Id., 136.

ROSS, J.

I concur in the judgment upon the third ground stated in the foregoing opinion written by the Chief Justice, and for the reasons given by me in concurring in the judgment in the case of *San Francisco Pioneer Woolen Factory* vs. *Brickwedel*, 9 Pac. C. L. J., 136.

MYRICK, J.

The provision of our State Constitution, which imposes upon the Board of Supervisors the duty of fixing the rates to be paid for water supplied to the City and County of San Francisco, as well as to the inhabitants thereof, must be obeyed, unless it contravenes that clause of the Constitution of the United States, which prohibits a State from passing any law imparing the obligation of contracts. The petitioner was incorporated under a general law providing for the incorporation of water companies, approved April 22, 1858.

San Francisco vs. *S. V. W. W.*, 48 Cal., 493.
S. V. W. W. vs. *San Francisco*, 52 Id., 111.

The law under which it incorporated is its charter, and to that extent it is protected as by a contract.

Chicago, etc., R. R. Co. vs. *Iowa*, 94 U. S., 155.

But it is a contract between the State and the petitioner exclusively. The City and County of San Francisco is in no sense a party to it. And the State, by the adoption of the present Constitution, has declared "that the rates or compensation to be collected by any person, company or corporation in this State for the use of water supplied to any *city and county*, or city or town, or the inhabitants thereof, shall be fixed, annually, by the *Board of Supervisors*, or City or Town Council, or other governing body of such city and county or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force one year and no longer."

That indicates with sufficient clearness, to my mind, an intention on the part of the State to alter the law which provided that the rates to be collected for water supplied for other purposes than extinguishing fires, flushing sewers, sprinkling streets and watering parks, should be fixed by a Board of Commissioners composed of four persons—two of whom should be selected by the city and county and two by the petitioner. And that in case of fire or other great necessity, it should be furnished free of charge. And the petitioner acquiesces in the change, (1) by requesting the respondents to comply with the constitutional provision; (2) by asking this Court to enforce a compliance with it.

But I attach little or no importance to such acquiescence. In my opinion the State had the right to alter or repeal the law under which the petitioner became incorporated without its acquiescence. I think so because the right to do so was expressly reserved by the Constitution. And I concurred in the opinion of Mr. Justice McKee in *S. V. W. W.* vs. *Supervisors*, (7 Pac. C. L. J., 614), in which he said: "But the company obtained its charter under a section of the Constitution of 1849, which authorized the formation of corporations under general laws, and reserved to the State the power of altering such laws from time to time or repealing them. As a part of the organic law of the State, this provision entered into the contract between the Company and the State, and when the corporation accepted the charter of the company, under the general law of 1858, they consented to take it subject to the exercise of the reserved powers of the State."

In speaking of the similar clause in the Constutition of Wisconsin, the Supreme Court of the United States said: "In Wisconsin, all corporations are liable to have their charters altered or repealed at the will of the Legislature."

Peik vs. *Chicago, etc., Railway Co.*, 94 U. S., 164.

I have said that while the charter granted by the State to the petitioner constituted a contract, the city and county of San Francisco was in no sense a party to it. But whether it was or not, could make no difference, because the Legislature could not, by inserting the clause which provides that water shall be furnished to said city and county for certain purposes free, deprive the State of the power to alter or repeal the law under which the petitioner became incorporated. The Constitution could not be evaded in that way. That part of the law was subject to alteration or repeal the same as any other part. It was not excepted or protected by the Constitution any more than any other provision of the law. It was subject to such alteration or repeal because the Constitution in force when the law was enacted declared that it should be subject to alteration or repeal. In *Chicago, etc., R. R. Co.* vs. *Iowa, supra*, "the Company had pledged its income as security for the payment of the debts incurred, and had leased its road to a tenant that relied upon the earnings for the means of paying the agreed rent," and it was claimed that that constituted a contract which would be impaired by the alteration which the Legislature had made in the law under which the Company incorporated. To that the Court replied: "The Company could not grant or pledge more than it had to give. After the pledge and after the lease the property remained within the jurisdiction of the State, and continued subject to the same governmental powers that existed before."

And it seems to me to be equally clear that in this case neither the Legislature nor the petitioner could make any contract which could interfere with the right which the State had reserved to itself of altering or repealing the law under which the petitioner became incorporated.

It is urged, however, that, if it be conceded that the people of the State, either by legislative enactment, or by the adoption of the constitution containing a provision inconsistent with that clause of the act for the incorporation of water companies which requires them to furnish water free of charge for the extinguishment of fires, etc., might alter or repeal that clause; that it has not been altered or repealed, because it is not inconsistent with the Constitution, and must therefore "remain in full force and effect until altered or repealed by the Legislature. (Const. Art. XXII, Sec. 1.) In other words it is claimed that the evident intention of the framers of the Constitution was to substitute the Board of Supervisors for the Board of Commissioners, provided for by the law as it stood before the adoption of the Constitution, and to confer upon the Board of Supervisors the same powers that had been previously conferred upon the Board of Commissioners, and none other, in respect of the fixing of rates to be paid for water suplied to private consumers and to the city and county of San Francisco.

If there is nothing in the Constitution which is inconsistent with the law in force at the time of the adoption of the Constitution, such law has not been affected by the adoption of the Constitution. So that the only question to be determined is whether the law in relation to the furnishing of water free of charge for certain specified purposes, is inconsistent with the clause of the Constitution which provides that the Board of Supervisors shall fix the rates to be collected for the use of water supplied to said city and county. If the law in relation to furnishing water for certain purposes free of charge be not inconsistent with any provision of the Constitution, it follows that if there were no such law the Legislature might now enact one, because any law which is not inconsistent with any provision of the Constitution is equally valid whether enacted before or after the adoption of that instrument.

And is it not quite clear that the Legislature could not now pass a law affecting the rates to be collected for water to be supplied to the city and county of San Francisco which would be valid? Has not the Constitution withdrawn that subject wholly from the jurisdiction of the Legislature? It seems to me that it has. And I do not think that under the authority to fix the rates to be paid for water supplied to said city and county, the Board of Supervisors would have the power to say that water should be furnished free of charge for any purpose. If for any purpose, why not for all purposes? Water must be supplied at the rates fixed by the Board of Supervisors. But there is no provision in the Constitution which requires that it shall otherwise be supplied; and if there had never been a law which provided that it should be supplied for certain purposes free of charge, I do not think that anyone would now claim that there was any power in the Board of Supervisors or in the Legislature, to compel the petitioner to furnish any water to the city and county for any purpose free of charge. And if not, it does seem to me that the law which requires that it shall be supplied for some purposes free of charge is inconsistent with the Constitution and therefore abrogated by it.

The requirement that rates to be collected for water supplied to the city and county of San Francisco, shall be fixed by the Board of Supervisors is, in my judgment, wholly inconsistent with the theory that such rates are to be fixed for only a part of the water suppled to said city and county. As well might it be contended that rates were to be fixed for only a part of that supplied to private consumers. The plain import of the language of the Constitution is that rates to be collected for all water supplied to said city and county and to the inhabitants thereof shall be fixed by the Board of Supervisors; and any law which provides that rates shall be fixed for only a part of the water supplied to said city and county is, in my opinion, inconsistent with the Constitution.

I am unable to preceive that the city and county could in any event be at all embarrassed in the case of fire, as it would then have the right, under the policy power, to use all the water necessary to extinguish it, whether rates had or had not been fixed.

I concur in the judgment that the writ issue as prayed.

SHARPSTEIN, J.

DISSENTING OPINION.

I respectfully dissent:

I.

Article XIV of the Constitution reads as follows:

"Section 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law; provided, that the rates or compensation *to be collected* by any person, company or corporation in this State for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the Board of Supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts, or resolutions, are passed by such body, and shall continue in force for one year and no longer. Such ordinances, or resolutions, shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board, or body, failing to pass the necessary ordinances, or resolutions, fixing water rates where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the Legislature may prescribe. Any person, company or corporation, collecting water rates in any city and county, or city or town, in this State, otherwise than as so established, shall forfeit the franchises and water works of such person, company or corporation, to the city and county, or city or town, where the same are collected, for the public use.

"Section 2. The right to collect rates, or compensation, for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

By the first section the Legislature is commanded to prescribe the manner in which the public use shall be regulated and controlled. The power of regulation and control is placed in the Legislature, without limitation, except that the rates or compensation "to be collected" for water supplied must be fixed annually by the Board of Supervisors, etc. The second section declares the right to collect rates to be a *franchise* which cannot be exercised "except by authority of and in the manner prescribed by law." Both sections contemplate legislation regulating and controlling the public use, by authority whereof, and in accordance with which, the right to enjoy the franchise of collecting rates or compensation, for water supplied, can alone be enjoyed. The *proviso*, in the first section, does not purport to treat of the powers of persons or incorporated companies, on whom the Legislature may confer the right to collect rates, except to the extent that the rates shall be fixed by the local authority. The whole purpose of the proviso is secured by giving to it the effect of making the Supervisors, or other local governing board, the commission to fix rates *when rates are to be collected*. Neither of the sections prohibits, in terms or by necessary implication, the Legislature from providing—in laws prescribing the regulation of the public use of water "for sale, rental, or *distribution*"—that water shall be furnished for certain public purposes free of charge. Under the present Constitution no laws have been passed prescribing the manner in which the use of water, which has been or may be appropriated, shall be regulated or controlled, or by what means *individuals* or corporations may acquire the franchise of collecting rates or compensation. If the plaintiff possesses the right at all, it is by virtue of its organization under the act of 1858, and such right is subject to all the provisions and conditions of that act; with the sole exception that, as held by this court in

> *Spring Valley W. W.* vs. *Supervisors*, 7 Pac. C. L. J., 614,

the rates, which, according to that act, are "to be collected" must be fixed by the Supervisors. Certainly, in my opinion, the 14th Article of the Constitution can be held to have no *greater* effect upon the act of 1858 than to transfer to the Supervisors a power previously employed by the mixed commission composed in part of the appointees of the corporation. By that act the plaintiff is authorized to charge for water furnished directly to the city and county for certain purposes.

> *Spring Valley W. W.* v. *San Francisco*, 52 Cal., 122.

As to such purposes there are "rates to be collected" which may be fixed by the Supervisors.

II.

The last clause of Section 19 of Article XI of the Constitution provides: "In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose under and by authority of the laws of this State, shall, under the direction of the Superintendent of Streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city or its inhabitants, either with gas light or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

The article treats of "cities, counties and towns." This caption includes "cities and counties" and the provisions as to *cities* in the nineteenth section are applicable to "cities and counties."

Constitution, Article XI, Section 7.

But Section 19 of Article XI is to be read in connection with Sections 1 and 2 of Article XIV. All portions of the Constitution are to be given effect. By Section 19, therefore, the power is not conferred upon every individual, under the direction of the Street Superintendent and subject to municipal regulations, to tear up the streets of a city for the purpose of laying down pipes, but only upon such individuals and corporations as shall acquire the franchise of collecting rates or compensation for waters to be supplied "by authority of, and in the manner prescribed by *law*;" the law, with reference to the use of water, commanded by the first section of the fourteenth article. No law has yet been passed providing for the manner of acquiring the right by individuals. Hence, the companies organized under the Act of 1858 have not yet acquired additional privileges, immunities or franchises by reason of Section 3 of that Act, which provides that all privileges which "may hereafter be granted to any individual * * * are hereby granted to all companies incorporated" etc.

Article XIV is headed "Water and Water Rights;" Article XI, as we have seen, 'Cities, Counties and Towns."

Section 19 of the Article last mentioned does not confer the right to charge tolls for water supplied to cities or their inhabitants. It presupposes the existence of individuals and corporations who shall have acquired the right "by authority of and in the manner prescribed by law," and confers upon such individuals and corporations the privilege of laying down water pipes in the streets, under municipal direction and regulation. Treating of *cities*, the nineteenth section recognizes the right of those who shall be clothed with the franchise of charging rates for water to enter upon and use the streets, but provides that the city shall have power (of which the Legislature cannot deprive them) of directing, by their appropriate officer, how the work shall be done so as to interfere as little as possible with the general use of the streets, and, by general regulations, to afford protection against damages. Still further, the section reasserts the right of the city government to fix rates to be charged for water supplied.

The Constitution does not confer the franchise of collecting water rates upon any person or class of persons. It leaves the power of granting such privileges to the Legislature, to be exercised by the enactment of general laws.

> Art. XIV, Secs. 1, 2 ; Art. IV, Sec. 25 ; Art. XII, Sec. 1.

In the opinion of members of this Court Section 19 of Article XI of the present Constitution *prohibits* the passage of a general law, providing for the acquisition of the franchise of charging rates for water supplied to cities, or the inhabitants thereof, which shall require water to be furnished free of charge for the extinguishment of *fires*. The right to demand a supply, and the right to demand compensation therefor, where "rates are to be collected," are correlative. As has often been held, a further supply may be refused to one indebted for water already furnished. Can the individual or corporation refuse to furnish water to subdue a conflagration because a back bill has not been paid by the city? If this be so, while buildings and other private property may be *destroyed* to prevent the spread of a fire, water cannot be taken to put the fire out if any sum be due for past supplies.

At all events, water cannot be taken to suppress a conflagration unless the city *shall pay for it,* while the citizen whose buildings are destroyed to prevent the spread of a conflagration, has no redress, unless expressly given it by Statute.

> *Dunbar* v. *San Francisco,* 1 Cal., 355;
> *Ruggles* v. *Nantucket,* 11 Cush., 433;
> *Stone* v. *Mayor, etc.,* 25 Wend., 157;
> *White* v. *Charleston,* 2 Hill., S. Car., 571.

I do not say that a statute or constitution cannot confer this extraordinary right on those to whom may be granted the franchise of charging rates for water distributed, but certainly doubtful or ambiguous language should not be construed as conferring it.

As I understand the view of the majority of members of this Court, it is held, that by a mandatory and self-executing provision of the Constitution, *every* individual, and every company incorporated to supply water to a city, is not only permitted to use the streets under municipal direction, but is also granted the franchise of charging rates or compensation "subject to the *sole* condition" that the rates shall be fixed by the municipality; that the Legislature under the present Constitution has no power to attach any other condition to the enjoyment of the franchise by an individual or corporation; and, that all conditions found in a law providing for the organization of water corporations, passed prior to the adoption of the present Constitution, were annulled by the provisions of that instrument. If this view be correct, the Legislature has no power to require that the *individual,* who shall acquire the franchise, must be a citizen, or even a person *capable of becoming* a citizen; has no power to require that the organizers of a water corporation shall be citizens, or persons capable of becoming citizens; no power (except by reason of an express constitutional provision) to provide that stockholders in such corporations shall be personally liable for any portion of the corporate indebtedness; cannot, in brief, require of *individuals* (or corporators) any qualifications, other than such as all individuals possess, or the assumption of any liabilities or duties other than those expressly mentioned in the Constitution. And this, although the condition at the end of Section 19, Article XI, is a condition upon *the use of the streets*, and not a condition upon the grant of the franchise of charging rates—a grant not contained in the section.

But I am not driven to consider the consequences of the rule. What portion of Section 19 of Article XI clearly and distinctly lays down this limitation of legislative power? That a limitation upon legislative power must clearly and distinctly appear in the Constitution of the State, has been so often asserted by the courts, that it would occupy space unnecessarily to cite the many authorities here. Again, the plaintiff here claims the new right to be paid for all water furnished for the extinguishment of fires. As it is settled that a limitation upon State legislation should plainly appear in the Constitution, it is equally settled that when there is serious doubt in respect to the interpretation of a law (or constitution) claimed to confer franchises upon individuals or corporations, it should be construed against the party claiming the privelege, and in favor of the public. This point is ruled in

S. V. W. W. vs. *San Francisco, supra.*

and the proposition is sustained by all the English and well-considered American cases. Franchises or immunities are not conferred or extended by ambiguous language.

The legislative exposition of the new Constitution is opposed to the theory here asserted by the petitioner. The sixth section of the act of March 7, 1881,

Stats. and Amendments, 1881, p. 55.

reads as follows:—"Rates for the furnishing of water shall be equal and uniform. There shall be no discriminations made between persons or between persons and corporations or as to the use of the water for private or domestic and public or municipal purposes, *provided* that nothing herein shall be so construed as to allow any person, company, association or corporation to charge any person, corporation or association anything for water furnished them, when, by any present law, *such water is free.*"

The present decision *annuls* the *proviso*, leaving the enacting clause to take effect in a sense the reverse of that intended by the Legislature.

I cannot agree, that the fourth section of the act of 1858, in so far as it requires water corporations to furnish water to a city "in case of fire or other great necessity" free of charge, is no longer of any force or effect, because in conflict with the last sentence of Section 19 of Article XI of the Constitution. If that sentence prohibits the Legislature from requiring that water shall be furnished "in case of fire," etc., free of charge, the prohibition is found in the words "regulate" and "thereof." It may be claimed that the right in the city to *regulate* charges implies a right on the part of the individual or corporation to *make* charges, and, as the word "thereof" relates to supplies to the city "for domestic and all other purposes," the charges which it is the right (and therefore the duty) of the city to "regulate" *include* charges for water used in putting out fires. Thus by a series of implications, and by deducing inference from inference, the language of the Constitution is made the equivalent of a direct declaration, annulling the clause in the act of 1858, which requires water to be furnished free of charge "in case of fire or other great necessity," and providing, that, from the time the Constitution should take effect, the Legislature should have no power to accompany the franchise with such requirement.

Is it thus that the framers of constitutions declare a limitation upon legislative power?

Section 19 does not purport to impose new duties upon municipal governments. It treats of their *rights*, giving them authority to direct how corporations or individuals, who shall acquire the franchise of distributing water, etc., shall use the streets, and to pass general regulations or ordinances, with reference to damages; and it re-asserts their *right* to fix rates. The *duty* of the municipalities to fix rates is imposed by the first section of the 14th article. Reading the two together, the last words of Section 19 of Article XI are in the nature of a proviso, that nothing that section contained shall be construed as depriving the municipal government of the right of regulating or fixing the rates "*to be collected*" as provided in Section 1 of Article XIV. To hold, that by reason of the use of the word "thereof," the constitution makers must have intended to prohibit the Legislature from allowing any water to be furnished free of charge, and to cast upon the municipal governments the duty of imposing charges upon *all* water supplied (which is *not* done in Section 1 of Article XIV—the section which directly treats of the subject and defines the duty), is to build a constitutional inhibition upon inferences from language whose main, and, as I believe, only purpose, is to re-assert the right of the local governments to fix the rates or compensation "to be collected."

III. It has been held that the provisions of the Constitution giving the right to, and imposing the duty upon the local governments of fixing water rates, did not impair the obligation of any contract between the State and the present plaintiff; also, that such provisions apply to corporations existing before the adoption of the Constitution.

S. V. W. W. vs. *Supervisors*, 7 Pac. C. L. J., 614.

If the question whether the provisions referred to were applicable to corporations organized before the present Constitution took effect were *res nova*, I should be inclined to the opinion that the provisions of the Constitution were not applicable to such corporations. The proviso in Section 1 of Article XIV follows an enacting clause, which declares the use of water "for sale, rental or distribution" a public use to be regulated and controlled in a "manner *to be prescribed* by law." And the sections of Article XII, which treat of ' Corporations," would seem to recognize the proposition that all laws concerning corporations in force prior to the Constitution, would continue in force until altered by legislation; except, perhaps, in certain particulars expressly mentioned in that article. But, in what is said herein, I have assumed that the sections of Articles XI and XIV apply to corporations formed under the law of 1858.

Assuming the constitutional provisions to apply to corporations formed under the law of 1858, I am at a loss to understand how the mere transfer, to the Supervisors, of the power of fixing rates relieves such corporations of the duty of furnishing water, free of charge, for the extinguishment of fires.

It is said, with reference to the effect of the constitutional provision upon the fourth section of the Act of 1858 : "The consideration for the duty imposed upon the Company to supply free water was the privilege conferred by the same section of the act upon the Company to participate in fixing the water rates. The duty and privilege were correlative, and when the privilege was taken away the corresponding duty ceased to exist." But the section of the act referred to does not purport to create any relation between the duty and the privilege which makes one dependent upon the other. Where then, is the duty made the *consideration* for the privilege, or the former made *correspondent* to the latter? By the Constitution of 1849 it is provided that general laws under which corporations can be formed "may be altered from time to time, or repealed."

Art. IV, Sec. 31.

It might be argued that there is a limit to this power of alteration, under the former and present Constitution ; that it cannot be employed so as to impair the obligation of a contract. But, as we have seen, this Court has already decided that the provision of the Constitution of 1879, transferring the power and duty of fixing water rates to the Supervisors, *does not* impinge upon vested rights, nor impair the obligation of any contract between the State and a water corporation formed under the Act of 1858.

S. V. W. W. v. *Supervisors, supra.*

How can a clause of the Constitution, of whose effects the corporations formed under the Act of 1858 have no legal right to complain, operate to relieve such corporations of any duty imposed by the law under which they were organized—the clause in the Constitution itself containing no language indicating any such purpose? The people by the Constitution of 1879 did not modify a previous contract between them and the plaintiff. The sovereign power took from its creature, not sacred *property*, but at most a privilege which it had reserved the right to retake by the 31st section of Article IV of the former Constitution. Such is clearly the meaning of the decision in

S. V. W. W. v. *Supervisors.*

The power, by the former Constitution, reserved to the State to alter general incorporation laws is of little value to the State or people if, in a case where admittedly the alteration *does not* impair the obligation of a contract, the power cannot be exercised without incidentally relieving corporations previously formed of some duties or obligations (not mentioned nor referred to in the amendatory law), supposed to have some "corresponding" relation to the privilege of which—for the future—such corporations are deprived by the alteration in the law.

IV.

I am perfectly willing to concede the public spirit which has induced the plaintiff to seek by this proceeding to relieve the individual consumers of water by imposing a portion of their burthen upon the city. I shall be glad if any practical benefit shall accrue by the change to the consumers or to the public. After all, however, the question is, what is the law?—not whether the law might be improved.

McKINSTRY, J.

I concur in the conclusion reached by McKinstry, J.

The second section of Article XIV of the Constitution declares in plain words that "the right to collect rates or compensation for the use of water supplied to any city, city and county, or town is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

It follows from these words that the right to collect rates or compensation for the use of water pertains to no person, company, corporation or association without authority of law. A law must exist vesting this right or it does not vest in any one. This is the common law, and it was inserted for some reason by the framers of the Constitution in that instrument as a part of the organic law.

It is urged that this right is given by the Constitution, and we are referred to the first section of Article XIV, and the nineteenth section of Article XI. I have examined those sections with great care and I do not find in any of them any such authority conferred as to rates or compensation. Those sections only make it the duty of the local authorities to fix rates.

As I understand the provisions referred to, they only effect this result, that where by law the franchise is conferred on an individual or company to collect rates or compensation, such rates or compensation can only be fixed by the local tribunals mentioned in those sections.

But back of all this lies the power of the Legislature to grant this right to collect and to limit it as to the persons chargeable therefor, and perhaps to say when it shall be collected, whether monthly or every three months.

I do not find any such grant in the Constitution. It does recognize the right as existing in some individuals or corporations, and makes it the duty of the Boards of Supervisors when such persons or corporations exist, to fix the rates to be charged by them. But in such cases, the right to collect exists by virtue of law, and is no more extensive than the law makes it, and the Boards of Supervisors, when they come to act, fix the rates as allowed by law. Such Board cannot fix rates to be collected when the statute says the water shall be free. They merely take the statute conferring the right as defined by statute, and fix the rates to be collected of such persons as are chargeable, and when the law says no charge is to be made for water furnished, they fix no rate.

There is no statute giving the right to collect rates to any person or corporation who shall lay down pipes and bring water into a city or town. On the contrary the statute

See Act of March 7, 1881, Statute 1881, p. 54.

goes no further than the Constitution. It is merely intended to carry out the provisions of the Constitution, and to enforce action on the part of the Boards of Supervisors in executing the duty devolved on them by the Constitution.

That the construction placed on the provisions of the Constitution by the Legislature is that urged herein, appears from the sixth section of the Act of 1881, above cited.

"Sec. 6. Rates for the furnishing of water shall be equal and uniform. There shall be no discriminations made between persons, or between persons and corporations, or as to the use of water for private and domestic, and public or municipal purposes; *provided*, that nothing herein shall be so construed as to allow any person, company, association or corporation, to charge any person, corporation or association anything for water furnished them when, by any present law, such water is free."

In this section, to show that the only object of the act was to enforce the provisions of the Constitution in relation to the duty cast upon the Supervisors by the Constitution, they expressly declare in the proviso to the sixth section, quoted above, that nothing in this act shall be construed as allowing a charge for water furnished, whereby any law, such water is to be furnished free.

If this deduction be incorrect it is yet clear, from this section, that the Legislature did not intend to change the law as to the obligation to furnish water free of charge when so required by statute, and the whole act shows no intention to confer any franchise to collect rates or compensation for water on any individual or corporation. The act was only intended to enforce the fixing of rates for the purposes of those who had the right to collect such rates already conferred by law.

I cannot perceive that the right to collect rates for water has been conferred on any individual, or company, or corporation, introducing water into a city or town, by the Constitution or the Legislature, when such rates are fixed by the Board of Supervisors, without any previous grant made by law to such individual or corporation to collect such rates, and, therefore, the act of 1858 remains unaltered, so far as the obligation to furnish water free of charge is imposed upon a company or corporation formed under that act.

I will add here that water is still to be furnished for municipal purposes under the act of 1858, for which rates are to be fixed. Such purposes are plainly pointed out in the opinion of the Court in

> *Spring Valley Water Works* vs. *The City and County of San Francisco*, 52 Cal., 122.

Such are the municipal purposes referred to in the sixth section of the act of 1881, and such are the rates to be collected of a city and county, etc., under the fourteenth article of the Constitution.

In my judgment, the majority of the Court have construed the power to *fix rates*, vested in the local bodies, as a power in such local bodies, to confer the franchise to *collect rates*, which power is given to the Legislature by the general express grant of the legislative power, and positively declared to pertain to the last named body by the second section of the fourteenth article of the Constitution. So far as the question before the Court is to be considered, the act of 1858 remains unchanged.

I am of opinion that the writ prayed for should be denied.

THORNTON, J.

The Spring Valley Water Company was organized under an act of the Legislature of the State, approved April 26, 1858. The object of its organization was to supply the City and County of San Francisco and its inhabitants with pure, fresh water. For that purpose the State delegated to it the right to exercise the power of eminent domain for the acquisition of property necessary to its use, and to use the streets, ways, alleys and highways in the city and county for conducting water into and through the city to any part of it. In consideration of the delegation of those rights, the Company bound itself to furnish water, to the extent of its means, to the city and county, in case of fire or other great necessity, free of charge, and to all its inhabitants on demand, for family use, so long as the supply lasted, at rates to be fixed according to law. The agreement to do these things was a contract between the corporation and the State, upon the performance of which the Company entered, and it has been since, presumptively at least, engaged in its performance according to law. At all events, it has had the protection of the law in the control and management of the property which it has devoted to the use of the public; and that use has been subject only to the regulation of the price which the Company is entitled to collect from individual consumers.

This power to regulate the use of property dedicated to a public use is, as we have heretofore held, in

> *The Spring Valley Water Works* v. *The Board of Supervisors*, 7 Pac. C. L. J., 614,

governmental, not contractual. It is a power which the State could not, if it would, delegate or barter away to any person, natural or artificial. In in the Constitution of the State this doctrine has been emphasized ; for Section 1, Art. XIV, of the Constitution, declares, "That the use of all water now appropriated for sale, rental or distribution, is hereby declared to be a public use, subject to the regulation and control of the State, in the manner to be provided by law ;" and Section 2, Art. XIV, prohibits "all water corporations from exercising the right to collect compensation, except by authority of and in the manner prescribed by law."

No complaint is made of any infringement of the rights accorded to the Company by the Act of 1858, under which the corporation was organized ; but it claims in this proceeding that the new Constitution has granted to it additional rights, and, at the same time, absolved and released it from the duty by which it bound itself to furnish the city and county with free water for the extinguishment of fires or other great necessities ; and that since the adoption of the Constitution it is now only bound to furnish water to the city and county at the same rates that it furnished it to other consumers. This claim of the Company is founded upon Section 19, Art. XI, of the Constitution, and Section 3 of the Act of 1858.

The latter provides that: "All privileges, immunities and franchises that may be hereafter granted to any individual or individuals, or to any corporation or corporations, relating to the introduction of fresh water into the City and County of San Francisco, or in any city or town in this State, *for the use of the inhabitants thereof*, are hereby granted to all companies incorporated or that may hereafter become incorporated, for the purpose aforesaid." And the former declares that: "In any city where there are no public works owned and controlled by the municipality, for supplying the same with water, * * * any individual or any company duly incorporated for such purpose under and by authority of the laws of this State, shall, under the direction of the Superintendent of Streets or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein and making connections therewith, so far as may be necessary for introducing and supplying such city and its inhabitants * * * with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

Relying on the third section of the Act of 1858, the Company asks this Court for such construction of that section and of the foregoing section of the Constitution as will stretch the former so that it may cover the latter and give to the corporation the immunities, privileges and franchises grantable under the latter. In my judgment the third section of the Act of 1858 cannot be stretched to that extent, and does not entitle the corporation to any other rights than those which it enjoys under its charter. The section contains a stipulation that the Spring Valley Water Company shall be entitled to all the immunities, privileges and franchises which may be granted to any person or corporation, "relating to the introduction of fresh water into any city or town in the State, *for the use of the inhabitants* thereof." Such are the terms of the stipulation, but they do not cover the terms of the constitutional provision relating to the introduction of water into a city "for the purpose of supplying *such city and its inhabitants* with fresh water for domestic and all other purposes." A contract to furnish water to a city for certain exigencies is not a contract to furnish water to the city and its inhabitants for all purposes. The greater includes the less; but the less does not include the greater; nor does it entitle a claimant under it to what may be included in the greater. A corporation is no more entitled than a natural person to that which is not nominated in its bond. The only rights it can claim under its contract are those specifically included within its terms; and any ambiguity or doubt arising out of those terms must be resolved in favor of the public. Both the Act of 1858 and Section 19 of Article XI of the Constitution must therefore be strictly construed, so far as the rights of the public are affected. Now, while it is true that there is no intimation of free water in the Constitution, it does not follow that the State intended to annul the Act of 1858, or to enlarge Section 3 of that Act so as to make it cover things which are not expressed by its terms, nor to release the Spring Valley Water Company from any of its obligations. Certainly none of these things can be presumed. To presume the latter would be to subject the framers of the Constitution to the imputation of legislating so as to impair the obligation of the contract between the corporation and the people. Such a construction would defeat one of the objects of the contract, *i. e.*, to obtain a supply of water for the City and County of San Francisco, free of charge, for certain exigencies. Whatever defeats the object of a contract violates its obligation. Any legislation which makes a contract more beneficial to one party and less to the other, than it purports by its terms to be, impairs the contract. To presume the latter would be to strike dead the corporation and strip it of its franchise and privileges.

The framers of the Constitution, therefore, never intended to sweep away the legislation under which the corporation was organized, nor to deprive it of its rights nor to release it from any of its obligations. For the Constitution has not conferred upon any person, natural or artificial, privileges, immunities and franchises in relation to the introduction of fresh water into any city in the State "for the use of its inhabitants" which have not been conferred on the Spring Valley Water Corporation by its own charter. The Company has exercised and enjoys the privilege of using the public streets and thoroughfares and of laying down pipes and conduits in them and of making connections with them in any part of the city. It has exercised and continues to exercise the right to collect rates or compensation for the water which it furnishes for family use and domestic purposes to the inhabitants of the city and county. What other or greater rights does the Constitution confer upon any other person that may, under the provision of the Constitution, undertake to supply fresh water to the inhabitants of any city in the State? None. Having these, there is nothing more which the Company has a legal right to demand. The obligation of the corporation to furnish water free to the city for the purposes specified in its contract is a thing distinct in itself from its obligation to furnish water to the inhabitants of the city. And the stipulation of the State contained in the third section of the Act of 1858 relates altogether to the latter and not to the former.

For these reasons I am led to dissent from the prevailing opinion.

McKEE, J.

110-348

115-347

Supreme Court of the United States.

No. 288.

SPRING VALLEY, Plaintiff in Error,

vs.

SCHOTTLER *et al.*, Defendants in Error.

POINTS FOR ORAL ARGUMENT FOR DEFENDANTS,
BY A. L. RHODES.

Judd & Detweiler, Printers.

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State the case, as in first brief for defendants, by Alfred Barstow.

RESERVED POWER TO ALTER CHARTER OF CORPORATIONS.

This case does not, in our opinion, occupy so vast a field as that which is outlined by the counsel for the plaintiff.

There are, at most, only two questions:

1st. Can the provisions in question, of the constitution, be sustained as a valid exercise of the power reserved by the State, to *alter* from time to time, *or repeal* a general law under which the corporation was formed?

2d. Or, if there be any question on that point, can they be sustained as a valid exercise of the *police power?*

Certain facts, stated by counsel, must be eliminated from the case, as they do not appear in the record.

It does not appear either that this company has expended $15,000,000, or any sum in acquiring rights to the use of water, or in the construction of works; or what works have been constructed by the corporation;

Or that the S. F. City Water Works, was organized as a corporation or introduced water;

Or that any company did or did not introduce water before the plaintiff—it not being a matter to be established by presumption;

Or that any of the ordinances mentioned in the pamphlet furnished by Mr. Fox, were in force.

Art. IV., Sec. 31, of Constitution of 1849, in force at adoption of Constitution of 1879, is as follows:

> "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. ALL GENERAL LAWS and special acts passed pursuant to this section, MAY BE ALTERED from time to time, or repealed."

Ever since the *Dartmouth College Case* provisions of a similar import have been inserted in the constitutions, or enacted by the statutes of most of the States.

When we ascertain what is the charter of the corporation, we then ascertain what may be altered or amended, by virtue of the reserved power to alter or amend.

An examination of special charters will disclose the wide scope as well as the very minute detail of charters.

See charter of Dartmouth College, 4 Wheat., 518. The provision therein for the appointment of a tutor, treasurer, or usher, is as fully a provision of the charter as is the provision that the trustees shall be a body corporate.

Mention other provisions of special charters.

By *general* laws the State may adopt all such provisions, and any conceivable number in addition—so only that they shall not contravene the Constitution or laws of the United States, or the constitution of the State.

Homestead corporations with power only to hold title to real estate to be distributed, within prescribed time, to the members by lot—the law might authorize the corporation to mortgage and sell the lands, or to distribute the subdivisions by auction, at which premiums for choice of lot might be paid.

The law for formation of savings banks may contain no provision as to the investment of the funds, or interest to be reserved on loans; or it may prescribe that the funds shall be invested only in Federal or State bonds, or that the interest shall not exceed a specified rate.

The law may prohibit certain class of corporations from acquiring title to real estate; or it may merely limit the amount or value of real estate that may be held, and the mode or purpose by or for which it may be acquired.

WHAT IS THE CHARTER OF A CORPORATION, or, in other words, a general law under which it may be formed?

It is an aggregation of legal provisions under which the corporation comes into existence, and by which it is governed; and there is no limitation upon the character or scope of those provisions, so only that they are not repugnant to constitutional law, or to the laws of the United States.

Wherever a law is found, giving power, privilege, or authority to corporations, formed or to be formed, or imposing limitation, restriction, or disability upon them, we have there a law for the formation of corporations, in the constitutional sense.

San Francisco *vs.* Spring Valley, 48 Cal., 493.

The Constitution, by its own force, annexes to each one of such laws, the condition or qualification that it may be altered or amended. The constitutional provision is inseparately attached to the law.

It cannot be surrendered.

It cannot be bargained away.

It cannot be evaded or ignored.

It cannot be defeated indirectly.

THE CONSTRUCTION OF STATE CONSTITUTIONS AND STATUTES, GIVEN BY SUPREME COURT OF A STATE BINDS THE FEDERAL COURTS.

Read p. 7, sub. 8, of my first brief.

It is as *incompetent* for any other authority than that of the State to say what provisions are charter provisions, as it is to say what provisions the charter shall contain.

Among the later cases we cite—

Fairfield *vs.* Gallatin, 100 U. S., 48.

This court had held that the constitution of Illinois prohibited donations to railroad companies, though there had been a vote in its favor before the adoption of constitutional provision in question. The State supreme court had then decided to the contrary, but it was not then brought to the attention of this court; and there were subsequent decisions of the State court to the same effect. *Held*, that this court will follow decisions of State courts.

To the same effect are—

Post *vs.* Supervisors, 105 U. S., 667.
Louisiana *vs.* Pillsbury, Id., 294.

The Federal courts conform to the settled construction of the highest courts of the State in the construction of the constitution of the State.

Town of South Ottaway *vs.* Perkins, 94 U. S., 260.

As to the construction both of State *constitutions and statutes*, by the highest courts of the State, see also—

People *vs.* Weaver, 100 U. S., 541.
State Railroad Tax Cases, 92 U. S., 606.
Stone *vs.* Wisconsin, 94 U. S., 181.
Hall *vs.* McCuir, 95 U. S., 500.
A. & P. R. R. Co. *vs.* Hopkins, 94 U. S., 13.
Lanahan *vs.* Sears, 102 U. S., 318.
Moores *vs.* National Bank, 104 U. S., 629.
R. R. Co. *vs.* Georgia, 98 U. S., 360.

Our position is, THAT THE ENTIRE ACT OF APRIL 22, 1858, CONTAINS ONLY PROVISIONS OF CHARTERS OF CORPORATIONS.

We are not without authority on this point. Section 4 of the act of April 22, 1858, contains several provisions, to the effect that the corporation shall furnish water to the inhabitants of the city, &c., at reasonable rates, and without distinction of persons; that it shall furnish *water* to the *city*, to the *extent* of its *means*, " *in case of fire or other great neces-*

sity," *free of charge:* that the rates shall be fixed by a board of commissioners, to be appointed as therein provided, and that the city authorities may prescribe such other proper rules relating to the delivery of water, &c.

The Ensign Act (Stat. 1858, p. 254,) provided in the third section that the chief engineer of the fire department might tap the water pipes and receive water for the extinguishment of *fires free of charge*, *until such time* as some other person or persons shall introduce water, when Ensign, his associates and assigns—the corporation to be formed under section 8 of the act—should furnish "*for fire* and *other municipal uses*, *their quota*" of water, *free of charge*, &c. Section 4 provides that the rates should be fixed by five commissioners, to be appointed in the same manner as those provided for by the act of April 22, 1858; but the rates were to be fixed so as not to yield less than *twenty per cent. per annum* upon the capital; and that if the city should *not elect to purchase those works*, as it was authorized to do in a certain event, then the *board of supervisors might fix the rates* for water, &c.

An action was brought by the city against the plaintiff in in error to determine the question whether the city had the *right* to *take water* from the pipes of the corporation, *free* of *charge*, for *all* other *municipal uses*, as well as for the extinguishment of fires, the claim of the city being based on Sec. 3 of the Ensign Act. In San Francisco *vs.* Spring Valley W. W., 48 Cal., 493, (Read, pp. 513–4 of that case,) it was held that the Ensign act was a *special act* for the *formation* of *corporations*, and *therefore unconstitutional* and *void;* and that the rights of the parties were to be determined by the general law of the formation of corporations, including the

4th section of the act of April 22, 1858. Many of the statutory provisions and ordinances are more fully stated in the same case, as reported on a former appeal, in 39 Cal., 473.

That decision would seem to be *conclusive* upon the proposition that the several provisions of the 4th section of the act of April 22, 1858, are only provisions of law for the formation of corporations. If the clause of the statute prescribing what water should be furnished to the city *free*, comes within that category, clearly the clause providing for the *fixing* of *rates* would *also* be *included.*

That doctrine was affirmed in—

Waterloo Turnpike *vs.* Cole, 51 Cal., 381.
(Read, pp. 384–5 of that case.)

The law, which was there held to be unconstitutional, required the Board of Supervisors to authorize the corporation to collect such tolls as would produce a certain revenue. If that be a provision for the formation of corporations of that class, clearly the one in question here is such a provision.

It will be observed that the court declares that *the whole* Ensign act is unconstitutional. It makes no saving. If it had not been regarded as containing only charter provisions, the *whole* act *would not* have been included in the condemnation.

See section 3, of Ensign Act of April 23, 1858, cited at length in 48 Cal., 493.

The corporation to be organized under that act is required to furnish "free water" for extinguishment of fires and for

" other munincipal purposes." And when other companies or persons shall introduce water, it is to furnish *its quota* only.

Its rates are to be fixed by a commission similar to that prescribed for by the act in question—act of April 22, 1858—but rates are to be such that they will produce not less than 20 per cent. on the capital.

It will not be claimed, and there is no ground for saying, that the State is prohibited from entering into a contract with a corporation respecting the supply of water.

If that portion of section 4 of act of April 22d, respecting the mode of fixing the rates, be a contract, then the similar provision of the Ensign act of April 23d is also a contract.

That it is not a contract is conclusively established by the decision in—

San Francisco *vs.* Spring Valley, 48 Cal., 493.

It is there held that those provisions are provisions for the formation of corporations; that they are a special law—not a general law—and are therefore *unconstitutional and void.*

They could not have been held to be void had they amounted to a contract.

They are void on the same grounds, and for the same reasons, that the provisions of the act mentioned in Waterloo *vs.* Cole, 51 Cal., 381, providing a mode for fixing tolls on the turnpikes in one county, which mode was different from that which was found in the general law, under which turnpike companies were organized, were *void.*

It will be noticed that in that case the court say that *all the laws* providing for the powers, privileges, duties, etc., of corporations *are laws for the formation of corporations.*

It is there as conclusively established as it is possible to be, that both of those acts are laws organizing corporations—the latter being void because special.

The decision of the State court, both in this case and the cases to which we have just referred, is sustainable, *both* on PRINCIPLE and AUTHORITY.

See Story in Dartmouth College Case as to reservation.

WHAT IS A CORPORATION?

A creature of the Statute.

Possesses simply and only powers conferred.

No limit to the restrictions and disabilities that may be imposed.

The law may authorize the formation of water companies, for the sole purpose of supplying water for municipal use, to the exclusion of all use by citizens. The rate may be fixed by law, or by the municipality, if the law delegates such power, or by any board or commission.

Savings banks.—No specification of the interest to be reserved, or securities in which funds are to be invested.

The law might have provided for both.

If neither were provided for, the law may be amended so as to provide for both, or either.

AUTHORITIES IN OUR SUPPORT ABUNDANT.

The question involved in—

Parker *vs.* Metropolitan R. R. Co., 109 Mass., 506,

was whether the Legislature, under its reserved power to amend, alter, or repeal acts of incorporation, could change the tolls to be collected by the ferry; and the reduction of tolls was upheld as coming within the power reserved to the Legislature.

In Shields *vs.* Ohio, 95 U. S., 319, so much relied upon by the water company on another point, the statute *fixing* the *tolls* was *upheld*, though the former company, before the consolidation of the companies, possessed that power. Dissent in that case was on ground that charter conferred right of property.

Greenwood *vs.* Freight R. R. Co., 105 U. S., 13, is a *clear case* of the exercise of the *reserved power to amend charters.* The court approves the remark of Story, that a provision in the statute reserving to the Legislature the right to amend or repeal the charter must be held to be a *part* of *the contract* between State and corporation.

R. R. *vs.* Hammersly, 104 U. S., 1, the statute required the corporation to establish a depot at a specified place upon certain conditions, the depot having been abandoned under authority conferred by an earlier statute. *Law was upheld.*

Whatever rules, says the court in—

Sinking Fund Cases, 99 U. S., 721,

might have been established in the original charter, *may now be established by amendment.* See—

Hoge *vs.* R. R. Co., 99 U. S., 351.
Tomlinson *vs.* Jessup, 15 Wall., 457.

In each of those cases, the laws of South Carolina forming the corporation, provided for the *exemption* of the property of the corporation from taxation for a certain period. But at the several times when those laws were passed there was a law in force, to the effect that *every charter* of a corporation shall remain, *subject* to *amendment*, *alteration*, *or repeal;* and it was held that the provision of the constitution, subsequently adopted, subjecting the property to taxation, was valid. See, also—

R. R. Co. *vs.* Maine, 96 U. S., 510.
New Jersey *vs.* Yard, 95 U. S., 111.

In the case last cited the court say, that this constitutional power to amend or repeal such law is an *inalienable legislative power.*

That power being *inalienable*, if reserved, as in this case, by the constitution, whenever it be found, that a particular statutory provision *is an amendment* of a charter, it must be upheld, as within the reserved power.

By the original charter in that case, when read, as it must be, with the constitutional provision inserted in it, the State says to corporation, *you must pay a certain tax*, but I, the State, may increase or diminish the rate. See, also—

Stone *vs.* Mississippi, 101 U. S., 816.
Sinking Fund Cases, 99 U. S., 718.
Chicago B. & Q. R. R., *vs.* Iowa, 94 U. S., 155.
Railroad *vs.* Maine, 96 U. S., 510.
Miller *vs.* State, 15 Wall., 498.
Holyoke *vs.* Lyman, Id., 519.
Tomlinson *vs.* Jessup, Id., 459.
Mayor of Worcester *vs.* N. & W. R. R., 109 Mass., 103.
Machine Co. *vs.* Gage, 100 U. S., 676.
Wrightman *vs.* Clark, 103 U. S., 260.
Post *vs.* Supervisors, 105 U. S., 667.

In California, at an early day, the statute provided that the tolls on turnpikes, bridges, and ferries should be fixed by the courts of sessions of the several counties. Subsequently the statute abrogated those courts, and boards of supervisors were provided for, and upon them were imposed most of the duties, not judicial, formerly pertaining to those courts. Will it be claimed by those, whether persons or corporations, owning turnpikes, bridges, or ferries, that they have a constitutional right to have those courts maintained for the purpose of fixing tolls?

CONTRACT CLAIMED BY THE PLAINTIFF.

It is earnestly urged that the provisions in question of the statute as to the mode of fixing the rates is a *contract*—a contract that is protected by the constitution. More orderly to consider first, whether it is a contract. But assume it to be a contract, but forming a part of the charter.

It will first be noticed that this claim is repugnant to the complainant, for that states that the corporation *was formed* under the act of 1858; complainant also states that the certificate of incorporation recites that the corporation was organized under several acts, one of which is the act of 1858. (See Record, p. 1.)

The whole act is therefore made a part of the charter, so far as averment and the certificate of incorporation can constitute it a part of the charter.

The provision in question being a part of the charter, it may be amended, *even if*, standing by itself, *it be held to be a contract.*

A contract does not cease to be a contract, or become something else than a contract, because some of its terms are subject to alteration by one of the parties.

A lease—terms subject to alteration. Rent may be increased; lessee may surrender a part of premises, as per contract.

Contract for services—$10,000 to be paid; and counsel, if he find it a difficult case, may increase fee to $15,000.

A charter does not cease to be subject to amendment or alteration because some of its terms take on the form of contracts.

It is immaterial what form or quality or character a provision of charter may take on; as it is a portion of the charter, it remains subject to the operation of the reserved power.

If the general law for the formation of any class of corporations read, It is hereby *covenanted and agreed* that corporations formed under this act shall possess the following powers, and be subject to the following limitations, &c., the constitutional reservation of power might be exercised by that or any succeeding Legislature.

If a charter provision escapes the power of amendment because it assumes the guise of contract, it may on the same ground defy repeal.

Whatever charter provision the Legislature has power to make, it has power to amend.

The power to amend and alter is not only inalienable, as one of the cases cited says, but is *inseparably annexed* to each provision of the charter—to all the laws for the formation of corporations.

We are not without authority on this proposition—

Hoge *vs.* R. R. Co., 99 U. S., 351,

Tomlinson *vs.* Jessup, 15 Wall. 457—

were *as fully contracts* as these provisions are alleged to be in this case. And so in the—

Sinking Fund cases, 99 U. S., 718.

In R. R. Co. *vs.* Georgia, 98 U. S., 360—
it was claimed that the *rate of tax* provided for in the original charters of the two companies were contracts.

The same was claimed in—

Pike *vs.* Chicago & N. W. R. R., 94 U. S., 176—
in respect to fares and freights.

It is said in—

Railway *vs.* Philadelphia, 101 U. S., 528–40:

If the language of the charter is sufficient to *impart a contract*, still the Legislature under the reserved power, may amend, and accordingly uphold increase of license on street railroad cars; and citing Dartmouth College case and Pennsylvania College cases.

See also Ruggles *vs.* Ill., Oct. T., 1882.

THOSE PROVISIONS OF THE ACT ARE NOT A CONTRACT.

What is the consideration?

Who are the parties?

We have already alluded to the decision of our own court on this subject. It is only a regulation—a govermental regulation.

Plaintiffs counsel do not agree as to the consideration for the supposed contract.

One says it is the obligation to furnish the "free water."

The others say it is to be found in the last sentence of section 2 of the act of 1858.

It is manifest from the decision in San Francisco *vs.* Spring Valley, 48 Cal., 493, that the supreme court of the State do not regard it as an element of a contract, but only as a charter provision—a matter constituting a portion of the general law for the organization of that class of corporations.

The proposition is, if possible, more obvious from the decision in—

> Spring Valley *vs.* The Board of Supervisors of San Francisco,

decided June 30, 1882. (See our supplemental brief, p. 5.)

Read bottom p. 2 and p. 3 our supplemental brief.

The company demanded that the Board of Supervisors should fix the rates for that which, before the adoption of the constitution of 1879, had been "free water."

They claimed that the constitution had amended the charter, and that it had made a new provision for fixing the rates for *all water* supplied to a municipality and its inhabitants.

The court held with the plaintiff, that the constitution had amended the charter; and that rates were to be fixed by the Board of Supervisors for *all water* furnished by the company to the city or its inhabitants.

The constitution could not, by legal possibility, have been held to have that effect, if "free water" constituted one of the terms of a contract.

We do not, nor could we, set up this judgment as an estoppel; but we do insist that the company cannot rely, for the consideration of a contract, upon that which it repudiates.

It cannot say: This is the consideration for the contract; we insist on the performance of the contract on the other side, but we refuse to perform on our part.

Perhaps the company cannot rely, for the consideration of a contract, upon that which it says it was not bound to furnish, and which it could not have been relieved from, if it had, in truth, formed a term of the contract.

Can a party to a contract consisting of concurrent or dependent covenants or agreements say, I insist upon the performance of the covenants on your part, but I am not bound to perform those on my part.

The other alleged consideration admits of a very simple and plain explanation. The last sentence of section 3, provides that the water works of companies organized under that act and for the purposes therein designated, shall be used for that purpose *exclusively;* that is .to say, they shall not be used for mining, for irrigation, for the furnishing of water power, or the like purposes; but shall be used only for the purposes for which the companies were permitted to be organized.

They were authorized by the same section to "purchase or appropriate and take possession of and use and hold all such lands and *waters* as may be required for the purposes of the company;" that is, the purposes mentioned in the law, *and not any other purpose.*

All the laws of the State for the formation of corporations, as well as this, contemplate, and intend to secure, competition.

If a municipality were situated upon a narrow and comparatively arid peninsula, one company, by being first in the field, might secure all the available water and establish a virtual monopoly, if it were permitted to acquire the right to all the available waters, but should use only a small part thereof for the purposes for which it was organized.

In the *absence* of that provision, or one of a similar import, a company organized under that act must use its water and water works for the purposes specified in the act, *and for none other*.

A railroad company cannot use the lands which it acquires for the roadway, stations, etc., for farming purposes.

A manufacturing company will not be permitted to appropriate its funds to banking purposes.

There is nothing in that clause tending to the construction that the corporation should never cease business.

The general law limits the period of existence of corporations to fifty years.

It also provides a mode for the disincorporation of *all corporations*.

It may also be added that there is no constitutional obstacle preventing the State, if she so chooses, from declaring that, if such a corporation shall exercise the power of eminent domain, to acquire the right to water, and the right of way, and shall occupy the public roads and streets with its mains and supply pipes, it shall continue to furnish water for a designated period. Although the State may so declare, it has not done so by this act.

Suppose the municipality were a mining town, which afterwards suffered the fate of so many in California, of abandonment, would it be claimed that the company must keep up the supply of water ?

Had the law omitted the provision as to the mode of fixing rates, would it be contended that the provision in question was the consideration for a contract that the *company* should have the exclusive right to fix the rates ?

We are unable to agree with the plaintiff in the construction of that clause, or to find in it the consideration for a contract between the company, on the one part, and either the State, or the municipality, or its inhabitants, on the other part.

IF THE PROVISIONS OF SECTIONS 2 AND 4 BE HELD TO BE A CONTRACT IT IS VOID.

If these provisions be construed as provisions of the *law organizing corporations*, and if it be claimed that they *also* should be construed as amounting to a *contract*, and that, by reason of the constitutional provision, the obligation of the contract cannot be impaired by the State, then we say that those provisions, if they must be construed as amounting to a contract, *are void.*

The State is under as complete *disability* to place an *irrepealable* clause in the law for the organization of corporations, as she is to pass a *special* law for the organization of a *particular* corporation.

POLICE POWER.

The amendment of section 4 of the act of April 22, 1858, by the provision found in section 1, article XIV, of the constitution will be upheld as a valid exercise of the *police power*.

License Cases, 5 How., 583.
Munn *vs.* Illinois, 94 U. S., 113.
Beer Company *vs.* Massachusetts, 97 U. S., 113.
Stone vs. Mississippi, 101 U. S., 816.

In the first case above (5 How.) the Chief Justice says that in the exercise of *police power* it has been customary to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, and in so doing to fix the maximum of charges for services rendered, etc., and cites Aldnutt *vs.* Inglis, 12 East., 527.

A large and important addition can be made to the above list, such as railroads, street railroads, telegraph, gaslight and water companies. The court further says, in 5 How., that "when private property is devoted to a public use, it is *subject to public regulation.*"

Stone *vs.* Mississippi, 101 U. S., 816, is very clear authority in support of this proposition. A lottery having been authorized, and a corporation created to manage it, and its duration fixed, and the several amounts to be paid to the State determined, and the constitution which was subsequently adopted having prohibited lotteries, the question presented was, *whether the act made a contract* which was beyond the reach of the constitutional prohibition. The court held that the Legislature could *not divest itself* of the *police power*, (p. 817;) that it could not bargain away the public health or public morals, (p. 819;) and *that the constitution repealed the charter.* And the court said that "whether the alleged contract exists or not, depends on the authority of the Legislature to bind the State, and the people of the State, in that way."

See also—

Metropolitan Board *vs.* Barrie, 34 N. Y., 657.
Moore *vs.* State, 48 Miss., 147.
3 Parsons on Contracts, 556.

See also Chicago, &c., R. R. Co. *vs.* Iowa., 94 U. S., 161, in which the regulation of fares and freights was upheld upon the principles of Munn *vs.* Illinois, 94 U. S., 113; they being engaged in a public employment, *affecting the public interest*, are therefore subject to *legislative control* as to their rates of fare and freight.

Further instances: Ferries, bridges, turnpikes, hacks, railroads, gas companies, street railroads.

There was a time when none of these were regulated by law.

Regulations of each and all of them are now upheld upon the grounds stated in—

Munn *vs.* Illinois, and
The Granger Cases.

AMENDMENT REASONABLE.

The amendment of the statute resulting from the adoption of Art. XIV of State constitution is not unreasonable.

The courts have not undertaken to furnish a *test* for the determination of the question, whether a given amendment of the law is unreasonable. Without doubt a law impairing the rights of a corporation to its property, or divesting it of a *vested right* in property, would be held invalid; and it would seem to be equally clear that a law which merely *changed the officers* by whom certain of the relations of the corporation with the public are regulated, would not be obnoxious to the objection. It cannot be claimed by the corporation, that the rates shall not be *fixed by authority of law*, for it was formed under a law which provided for the fixing of rates. Can it be said that the delegation of this authority to the "governing body" of the city is unreasonable? The liability to injury is no greater in this case than is that of the street railroad company, or the baker, or the hackman. This corporation has no better right, derived from the character of its business or ownership of property, than have the other persons mentioned, to *demand exemption* from the control or interference of the "governing body" of the city. The corporation might complain of the *rates, when fixed*, if they be too low, but not of the instrumentality provided by the law for fixing them. The *State* may, without invading the rights of the corporation, *select its agents* for that *purpose*, in any way it may deem proper.

ANSWER TO PLAINTIFF'S POINTS.

Some of the plaintiff's points require more particular attention than has already been given to them.

It is claimed that the provisions in question of the constitution, *impair the rights* of the corporation, *to its property*, and to its use.

We do not claim that the State may *directly* impair such rights.

But all, or almost all provisions amending charters of corporations, must indirectly affect the property of the corporations.

A change in the number of trustees, or the mode of their election, might materially impair the value of the corporate property.

The fact that the value of the property of, or stock in, a street R. R. Co. might be diminished, in consequence of a reduction of the fare was never thought to afford a constitutional objection to such reduction.

It is no valid objection to the exercise of the police power, in the form of regulations, that it might produce a similar effect upon property of individuals.

Nor is it any valid objection to the exercise of such power, in respect to business or property, affected with a public use; that one purpose of the regulation is the reduction of the income derived from such business or property.

Who will doubt that if the law had been silent as to rates, and the mode of fixing them, the State could have adopted regulations in those respects?

It is asserted that *water is a commodity*, and that a regulation of rates is a regulation of the price of a commodity, and therefore cannot be upheld.

We deny all the terms of the proposition.

It is not a commodity, in the sense that wheat is.

The utmost that any one can acquire in it, is *its use*.

The books are so full of this doctrine that we shall not undertake to cite cases.

(Something was said in the oral argument about catching and storing the rain, as it falls; but after a laborious examination of the record, we fail to find therein "rain" or "storage of rain water.")

The right that the company has to or in water, is only such as is contemplated by section 2 of the act, may be acquired by the company by purchase or *condemnation*.

By the exercise of those powers the company may acquire a right to divert and use the waters of a running stream, but it has never been claimed, as yet, that by the exercise of those powers, a company could condemn one thousand gallons of water, or the contents of a cistern.

The only manner in which any one can exercise ownership of water is by its use.

Its use exhausts all the property any one can have in it.

Water appropriated for domestic purposes, or for manufactures, or for irrigation, or for a motive power, etc., when used, all the property therein of the person using it is exhausted.

There is no possible mode for the regulation of the use of water, gas, electricity, and many other substances, that will not amount to a regulation of the price of the commodity.

Conceding it to be a commodity, like wheat, why may not the State say, you may form a corporation to supply a city and its inhabitants with water, provided that the State reserves the right to fix the price of that commodity.

Should all the bakers of San Francisco combine and form corporation to transact the business of manufacturing and selling bread, it would be not only the right of the State to fix prices of bread, but it would be its *duty* as well, in behalf of good government.

Perhaps the best answer to the proposition is found in the fact that the plaintiff organized under a law which provided for the fixing of rates.

The only difference between the old and the new law consists in the board by which rates are fixed.

The exercise of the power to fix the rates, or to provide a board for that purpose, must be upheld, unless the plaintiff can prove that it has a *vested right in a police regulation.*

It is urged that the *last sentence of sec.* 4 of the act is ungrammatical, and does not mean what its words would seem to impart.

There is an ellipsis of a member of the sentence which relates to the word "such."

That by the use of the words "other rules," the Legislature intended to say, that the foregoing provisions of the section are *rules*, is beyond all question. The provision for furnishing water to the inhabitants, also to the municipality, "in case of fire or other great necessity;" and that for the appointment of the Board of Commissioners, and that declaring the period for which the rates should remain in force are all *rules*—governmental regulations.

It is urged as an objection to the vesting of power in the Board of Supervisors, of fixing rates, that it makes them *judges in their own case.*

Such power is usually conferred upon like boards, in case of gas, street railroad fares, bridges, ferries, turnpikes, and the like; and we are not aware that such an objection to the composition of the Board was ever sustained.

The same objection would exist to the fixing of fares and freights of railroads by the Legislature.

As the law stood, two members of the Board of Commissioners might, and almost necessarily would, be interested in behalf of the company.

The opinion in the appendix to our supplemental brief shows that the company *demanded that these judges in their own case* should fix rates for water which formerly was "free water."

It is urged that Sec. 1, Art. XIV of the constitution of 1879, declaring that "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be described by law," is void, because repugnant to the Constitution of the United States. However this may be, in case of waters which have not been appropriated to public use, but merely rented or sold, the question, as here presented, is abstract; for the waters of the plaintiff were appropriated to public use by the very law of its organization. That section did not change the status of the plaintiff, or place it under any new liabilities or obligations in that respect to the municipality or the public.

Complaint is made of the *forfeiture clause* of Sec. 1, Art. XIV—the last sentence of the section, which is to the effect that a company or person collecting rates otherwise than as established by the "governing body" of the municipality, shall forfeit the franchise and water works to the municipality.

The objection to this clause is urged upon the theory that the validity of the constitutional mode of fixing the rates can be determined by considering the penalty prescribed for collecting rates not fixed as that section directs.

I fail to see any logical connection between the two ideas or propositions. The power to prescribe a given mode for fixing rates is not in any manner dependent on the question whether any penalty, or consequence even, be prescribed for fixing or collecting rates in other modes or sums. The Legislature may have the power to prohibit the doing of a particular act; but may not have the power to provide a *particular* penalty for the violation of the law. The right to exercise the power in the one respect, is no test of the possession of the power in the other.

Had the penalty, instead of a forfeiture of the works, been a forfeiture of $100 per annum, the argument would have been the same. The *severity* of the penalty is not a test of the power to prohibit the doing of the act.

Without doubt, the Legislature may enact that clerks of courts shall collect only the fees fixed by a schedule to be prepared by the judges of their courts; and the question of the legality of that mode of fixing the fees, cannot be determined by the penalty prescribed for collecting fees otherwise than according to the schedules. The mode is unquestionably legal when no penalty is prescribed; and remains legal if the penalty be a fine, or liability to a recovery, of double the amount collected in excess of the schedule; but does the mode become illegal when or because the penalty prescribed is a forfeiture of goods to the State?

The power of the State to prescribe a particular mode for fixing rates, and to prohibit the collection of rates otherwise than as so fixed, is not dependent in any measure upon the question, whether the State has the power to prescribe a penalty for a violation of the law in either of those respects, or whether any penalty has been prescribed, or whether the penalty prescribed be trifling, or adequate or outrageously excessive.

In conclusion. At the bar of this Court appears an artificial being, made and fashioned by the State according to her own will and pleasure, possessing only such powers, privileges, and immunities as the State saw proper to give it, and subject to all the restrictions, limitations, and disabilities that the State chose to impose, an inherent element of whose being is, that it may be refashioned at the will of its creator; and now it demands the protection of the Constitution of the United States, to restrain the State from the exercise of its power to alter one of the features of its creation. Its demands cannot be acceded to without divesting the State of the power which it has reserved over all its corporations. The State cannot divest itself of this power, and the Constitution and laws of the United States will not be held to have that effect.

The want of time to prepare and correct a report of my oral argument, suggested the writing out of my notes for the agument. I trust that this course is not objectionable.

Respectfully submitted,

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